Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-125

ALAMO LAND & CATTLE CO., INC., Petitioner,

v.

STATE OF ARIZONA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FOR THE NINTH CIRCUIT

OPINIONS BELOW

Attached as Appendix A is the opinion of the Court below which is by the Court of Appeals for the Ninth Circuit.

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked under 28 *U.S.C.* § 1254(1) (1966), which permits the United States Supreme Court to issue a writ of certiorari to the United States Court of

Appeals. The judgment sought to be reviewed is dated March 28, 1974 [Appendix A] and pursuant to *Rule 36* of the *Federal Rules of Appellant Procedure* was entered on that date, but as contemplated by *28 U.S.C.* § 2101 (1959), this Writ of Certiorari is timely because it is filed within ninety (90) days from May 17, 1974, the date of denial by the United States Court of Appeals for the Ninth Circuit of Petitioner's petition for rehearing to that court.

QUESTIONS PRESENTED

1. Do *New Mexico-Arizona Enabling Act* provisions concerning school trust lands granted to Arizona that generally provide that no sale or other disposal of the land shall be for less than its full appraised value but do not provide who shall receive said proceeds and are silent about condemnation, require that upon condemnation by the United States of America of such land, Arizona's tenant, in spite of established condemnation principles recognizing a property right of the tenant that entitles the tenant in condemnation proceedings to receive the value of his leasehold interest, receive nothing for such interest under any circumstances?

2. Even if the *New Mexico-Arizona Enabling Act* requires that in a condemnation proceeding Arizona must receive the full value of lands transferred from it, is such requirement satisfied by evidence, as before the District Court below, that Arizona received more than what the value would have been without the tenant's leasehold interest, and the tenant received less than the enhancement of the value of the land because of the leasehold?

THE CONSTITUTIONAL PROVISIONS OR STATUTES INVOLVED

U.S.C. Constitution Amendment 5 (1972); *U.S.C. Constitution Amendment* 14 § 1 (1961); § 24 and § 28 of *New Mexico-Arizona Enabling Act*, said *Enabling Act* being found at *36 U.S. Stat.* 557, 568-579 (1910) and in *Volume 1, Arizona Revised Statutes* (1956) at 79-98; part of *Volume 12, Arizona Revised Statutes* § 37-291 (1956); and *Volume 12, Arizona Revised Statutes* § 41-511.06 (Supp., 1973). These are verbatim set forth in Appendix B.

STATEMENT OF THE CASE

The United States of America condemned two sections of land owned by the State of Arizona in trust pursuant to § 28 of the *New Mexico-Arizona Enabling Act*. At the time of the condemnation, as specifically allowed by said section, a lease was in existence between Arizona and Petitioner. Both Petitioner, the lessee, and Arizona, agreed that the amount tendered by the United States of America to the Federal Registry at the time of the taking by the United States of America was reasonable. This sum was $48,220 for one section and $70,400 for the other, or total of $118,620. Evidence was received by the District Court for the District of Arizona at a distribution hearing held to determine the respective entitlement to the condemnation monies by Petitioner and Arizona. Arizona's position was that it was entitled to the full amount on deposit, less only $3,600 that represented the present value of physical improvements by Petitioner. Petitioner contended, to quote a part of the written opinion of the District Court, that "the true value of the premises would be reflected in the use of the premises in connection with other properties owned or controlled by Alamo [Petitioner] as a cattle ranch; that the

property would otherwise be relatively, of no value." Consequently Petitioner contended that pursuant to established federal law condemnation principles, it was entitled to receive a share of the nonimprovement condemnation monies at issue, $115,020, which it alternatively claimed was the difference between the full market value of the property and the value of the lessor's interest or the amount of the enhancement of the value of the property solely because of its leasehold, to-wit: the difference between the value of the property with the leasehold and what it would have been without the leasehold.

At trial, Arizona's appraiser explained the following statement contained in the appraisal of the United States of America. The statement was, "Consequently, the market value of these river bed lands is inseparable from their usefulness in connection with the dry grazing areas on both sides of the river, which desert areas are useful only when water, livestock control, and dependable forage can be relied upon." The answer was "As I understand the statement, he gave consideration to the fact that the state lease land is a part of an operating unit and has value because it serves as a part of that unit with the dependable irrigated forage . . ." Transcript of record, at 86-87. The same appraisal contained a statement "Tenure has been stable even when the lessees have cancellation clauses and termination dates. Preference for renewal has been both officially sanctioned and practiced as a custom." The State's appraiser conceded such "...is exactly in accordance with the information given me by these five gentlemen [former land commissioners] of long experience and it is my understanding of the way matters have been handled." Transcript of Record 87. Petitioner's evidence supported this increase in value. Its appraiser said that the two sections, as isolated sections and without consideration to its actual use as part of Petitioner's cattle operation, would be worth a total of only $40,000 to $50,000.

The evidence showed that Petitioner's headquarters was in proximity to the two state lease sections and cattle were rotated between the two sections, which had little but some water, and Petitioner's irrigated farmland next to a river that had a tremendous water supply, as proved by the very condemnation of the United States of America which was for the purposes of a water storage dam.

Petitioner's appraiser testified to facts to support the conclusion that the remote and isolated subject property, scores of miles from any substantially populated community and only accessable by dirt road, but for the condemnation, at the end of its lease term, six years, would at least have had one more ten year renewal. On a sixteen year basis, he then capitalized both the rental value and the reversion to determine Arizona's paramount interest to be $57,970 and determined Petitioner's leasehold to be $57,049. The District Court, by judgment, adopted these figures, except that it awarded a missing dollar to Petitioner of $57,050. Thus, Arizona received more than the $40,000 the land would have been worth without the enhancement in value from the leasehold.

Arizona appealed to the United States Court of Appeals for the Ninth Circuit, which by the opinion attached as Appendix A, reversed, awarding both sums to Arizona, $115,020.

The Bureau of Land Management tables reproduced in Appendix C show the vast number of school trust lands throughout the United States. They total 77,629,220 acres! *Lassen v. Arizona Highway Dept.*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967), in footnotes 2 and 3, agrees with this table as to Arizona's total, and the national total by stating, respectively, 8,000,000 acres and 78,000,000 acres. Appendix D shows Arizona now has vested title to 8,156,380.18 acres of school trust land.

The United States of America has not been named a respondent because it did not actively participate in the distribution hearing before the District Court nor in the appellate proceedings before the Court of Appeals for the Ninth Circuit. Nevertheless, as a courtesy, three copies of this petition have been sent to the Solicitor General, Department of Justice.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

28 U.S.C. § 1358 (1962) and *28 U.S.C.* § 1403 (1962) confer original jurisdiction of condemnation proceedings to the District Court of the United States in the district where the land is located, which was the United States District Court for the District of Arizona. Authorization for the condemnation proceedings by the United States is found in *40 U.S.C.* § 258a (1969) and act supplementary and amendatory thereto, in *33 U.S.C.* § 591 (1970) and *33 U.S.C.* § 701 (1970) and in *Public Law 534-78th Congress* which authorized construction of the Alamo reservoir and *Public Law 89-299* which appropriated funds for construction of such reservoir.

REASONS FOR GRANTING THE WRIT

1. The decision below, in determining that Petitioner is not entitled to any compensation for its leasehold interest, conflicts with the unanimous condemnation principle as evidenced in *A. W. Duckett & Co. v. United States*, 266 U.S. 149, 45 S. Ct. 38, 69 L. Ed. 216 (1924), that in condemnation a lessee is entitled to compensation for damage to his leasehold just as the lessor is entitled to damage to his reversionary interest.

2. The decision below in determining that Petitioner is not entitled to any compensation for its leasehold interest upon condemnation by the United States of America because the subject lands were owned by the state [Arizona here] for school trust fund purposes directly conflicts with *Nebraska v. United States*, 164 F.2d 866 (8th Cir. 1947), *cert. denied*, 334 U.S. 815 (1948), which requires that school trust lands upon condemnation must be treated as any other property and the lessee is entitled to compensation from the award for his leasehold interest.

3. The decision below fails to recognize that even if, upon condemnation of state school trust lands, the state must receive its full appraised value, such does not preclude the state's lessee from receiving the amount that the leasehold has enhanced the value of the property beyond what it would have been worth had there been no lease. This conflicts with every condemnation principle emanating from the *5th Amendment* to the *Constitution of the United States of America* announced by this Court and the Court of Appeals.

4. Settlement of these questions, which have not yet been settled by this Court, is necessary because many citizens are affected by the decision below because the various states have been granted 77,629,220 acres of school trust fund lands and in addition, if such lessees are not entitled to compensation, they will lose present financing.

ARGUMENT OF REASON 1 AND 2 FOR GRANTING WRIT AND QUESTION PRESENTED 1

The opinion below attempted to avoid the *Fifth Amendment* which it recognized would ordinarily require Petitioner to receive just compensation for its leasehold interest by saying that "How-

ever, under the *Enabling Act*, Arizona, as trustee, had no power to grant a compensable property right to Alamo [Petitioner]". Laconically, the reasoning was that Arizona held the lands as trustee and the trust would be violated if it received less than the full value of the fee and to hold otherwise would be in contravention of *Lassen v. Arizona Highway Dept.*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967). Although *Lassen* specifically stated that "the *Enabling Act* unequivocably demands both that the trust receive the full value of any land transferred from it and that any funds received be employed only for the purpose for which the land was given" [87 S. Ct. 588], *Lassen* did not consider the *Fifth Amendment* right of a state lessee. *Lassen* determined that upon condemnation of these trust lands by Arizona, Arizona must pay full value to the school trust. Neither *Lassen* nor any other decision of this Court has determined that under such circumstances the lessee is not entitled to its leasehold interest. The question then becomes whether an *Enabling Act* [Arizona's] which provides that when the four trust lands . . . are offered for sale they must be "appraised at their true value," and that "no sale or other disposal . . . shall be made for a consideration less that the value so ascertained . . . ." [*Lassen*, 87 S. Ct. 588, 589] and also provides for leasing the property, but which is silent about condemnation, means that upon condemnation the *Fifth Amendment* is satisfied if the lessee receives nothing for his leasehold interest.[1] While said provision just quoted requires condemnation by the state of trust fund lands, because literally applied it requires that upon disposition of the land, an appraised true value be paid, the provision does not say who the funds shall be paid to. It does not say only to Arizona.

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1 Herein leasehold interest is distinguished from the value of improvements which was $3,600.

Contrary to the position below, the appropriate portion of the *Arizona Enabling Act*, § 28 [Appendix B] specifically permist leasing. Nowhere does said section or any other provision of the *Arizona Enabling Act* [see *Volume 1, Arizona Revised Statutes* (1956), at 79, 98] provide what happens upon condemnation. The problem of compensation of a leasehold interest was before the United States Court of Appeals, Eighth Circuit, in *Nebraska v. United States*, 164 F.2d 866 (8th Cir. 1947) *cert. denied*, 334 U.S. 315 (1948), which recognized that:

> "It [the *Nebraska Enabling Act*] did not agree that, should condemnation of such land subsequently become necessary for sovereign purposes, it would take more than the fair market value of the land in compensation. It did not assume to save the state harmless in such a situation from a diminution of the market value of the state's rights through the creation of a leasehold, easement, or other interest in the land by the state's own acts." 164 F.2d at 869

Arizona has recognized that the interest of a lessee in school trust land and his preferred right to renewal "is a valuable, substantial right." *Ehle v. Tenny Trading Co.*, 56 Ariz. 241, 107 P.2d 210, 212. The reason was that not "to recognize equities in those who have built up a ranching business. . . would be injurious if not destructive to that industry." *Ehle*, 107 P.2d at 212. Additionally, the Arizona Legislature thought, as expressed in *12 Arizona Revised Statutes* § 41-511.06 (Supp. 1973), Appendix B, that upon condemnation, obviously because of the *Fifth Amendment* to the *United States Constitution*, a state lessee was entitled to "fair and adequate compensation for the cost and damage to his property interest or loss of his lease. . . ."

New Mexico is in accord as shown by *State ex rel. State Highway Commission v. Chavez*, 80 N.M. 394, 456 P.2d 868 (1969), wherein the New Mexico Supreme Court said that to not allow compensation for the leasehold interest "would be of questionable constitutionality as permitting the taking or damaging of property without the payment of just compensation." 456 P.2d at 873.

Based upon this analyzation, the opinion below and the opinion in *Nebraska v. United States*, 164 F.2d 866 (8th Cir. 1947) *cert. denied*, 334 U.S. 815 (1948) are in direct opposition. Neither the *Nebraska Enabling Act* nor the *New Mexico-Arizona Enabling Act* provide anything about whether a lessee receives just compensation for his leasehold interest upon condemnation. *Nebraska*, in recognition of the *Fifth Amendment*, as above, said *Nebraska's Enabling Act* "did not assume to save the state harmless" in condemnation "from a diminution in the market value of the state's rights through the creation of a leasehold. . . ." 164 F.2d at 869 Although this is recognition of the fact that an *Enabling Act* could have so provided by in essence setting forth the same thing as a condemnation clause in a lease wherein it is provided that, upon the taking by eminent domain of the whole or a part of the premises leased the term shall come to an end or the lessee shall receive nothing upon condemnation [see *4 Nichols on Eminent Domain* §12.42[1] at 12-488, 489], neither the *Nebraska* nor the *New Mexico-Arizona Enabling Act* so provided. Consequently, the *Fifth Amendment* does require that Alamo's leasehold interest be recognized. This is to say that since denial of the state lessees right to receive just compensation for his leasehold interest is to work a forfeiture, such denial will not be implied, but only effected when no other result is possible. *2 Nichols on Eminent Domain* §5.23[2] at 5-94 wherein it is stated:

"It has been held that the law does

> not look with favor on clauses causing forfeiture of the lessee's interest on condemnation, hence, a lease covenant will be construed not to have that effect if its language and the circumstances possibly permit."

ARGUMENT OF REASON 3 FOR GRANTING WRIT AND QUESTION PRESENTED 2

Even if it be decided that the *Fifth Amendment* be satisfied by determining that the state, as the trustee of school land, upon condemnation must receive the full appraised value of the land, can such logic be stretched to mean that the state should receive a windfall by receiving more than it would have received had the land not been leased? The statement of facts shows that the appraisal of the United State of America was based upon enhancement of the market value of the property because it was being used by the lessee in combination with lands belonging to the lessee (petitioner). This is in accord with recognized condemnation law. *4 Nichols on Eminent Domain* §12.314 pp. 12-216, 217 states:

> "Thus, where the adaptability for a specific use depends upon the land being used in combination with lands belonging to other persons, such use may be shown if the possibility of such combinations is so great as to have a definite effect in enhancing the market value of the property."

United States Supreme Court's decisions cited in the footnote in support of this statement are *Olsen*

v. *United States*, 292 U.S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 (1934); *McCandless* v. *United States*, 298 U.S. 342, 56 S. Ct. 764, 80 L. Ed. 1205 (1936); *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 63 S. Ct. 1047, 87 L. Ed. 1390 (1943); *United States* v. *Fuller*,[2] 409 U.S. 488, 98 S. Ct. 801, 35 L. Ed. 2d 16 (1973). Because condemnation does "seek the value of 'the fee as a whole'" the law does permit "proof of the enhancing value of the lease." *4 Nichols on Eminent Domain* §12.36[1] p. 12-435. There was ample evidence that this is all that petitioner received. There is no legal theory or precedent that would require an implication from or interpretation of the *New Mexico-Arizona Enabling Act* that would deny a lessee of his *Fifth Amendment* right to receive the enhancement of the fee solely and only resulting from the leasehold.

ARGUMENT OF REASON 4 FOR GRANTING WRIT

This is not an isolated evidentiary matter peculiar to petitioner. A perusal of the *Enabling Acts* of the various states will show that ordinarily only a few sections per township were designated as school trust lands. In the arid southwest, as recognized by the appraiser for the United States of America [see *Statement of Facts*], the state lease lands are operated by the various lessees in conjunction with other property owned by the lessee The very enhancement of value of the land at issue herein was because the lands were close to peti-

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2 The subject land there is adjacent to Petitioners. If the decision below stands, petitioner and those similarly situated will lose, upon condemnation, not only any enhancement of the value of their fee lands because of their Taylor Grazing permits, but the value of their leasehold interests in school trust lands leased from a state.

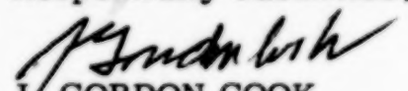
tioner's headquarters and more cattle could be grazed upon the subject lands than otherwise because of rotation with irrigated grazing land adjacent to petitioner's headquarters. Otherwise such land would have been of little value or less than half of what the United States of America deposited in the federal registry. The attached inventory of lands held in trust by the Arizona State Land Department [Appendix D], 10,648,207.63, and information contained in amicus curiae briefs that the number of school trust land in New Mexico leased for grazing purposes is in excess of 9,000,000 acres, and the filing of an amicus curiae brief by the White Sand Ranchers Association concerning thousands of state leased acreages under condemnation involving 120 families and 50 ranchers, establishes that the determination of the questions presented herein is and will be important to many citizens.

The importance is not limited to condemnation, because the amicus curiae briefs expected to be filed by the State of New Mexico and various Production Credit Associations, the Federal Land Bank of Wichita and the Intermediate Credit Bank of Wichita shows that if the opinion below stands, obtaining financial funds upon the security of an assignment or a mortgage of an interest in state leases, permitted by the *New Mexico-Arizona Enabling Act*, will no longer be available. The whole purpose of obtaining school trust funds from leasing such lands will be thwarted. This financing loss will include the more valuable lands leased for agricultural leases for which more rent is charged. The result will be detrimental to the school trust fund purpose by destroying the ability of many lessees to lease such lands.

CONCLUSION

For all of the reasons set forth above, Petitioner requests the Supreme Court of the United States of America, by a writ of certiorari, to review the judgment and opinion of the Court of Appeals for the Ninth Circuit that is attached hereto as Appendix A.

Respectfully submitted,



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CERTIFICATION

J. Gordon Cook, being duly admitted to practice before the Supreme Court of the United States of America, herewith certifies that three copies of the petition have been delivered to the State of Arizona by depositing the same in the office of the attorney for the State of Arizona who appeared below in the District Court and the United States Court of Appeals for the Ninth Circuit, to-wit: Peter C. Gulatto, Assistant Attorney General, State of Arizona, State House, Phoenix, Arizona, 85007.

Additionaly, as a courtesy, I herewith certify that service of three copies of this petition has been made upon the United States of America by depositing the same in United States mailbox, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

J. Gordon Cook

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APPENDIX A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

and

ALAMO LAND & CATTLE CO., INC.,

Defendant-Appellee,

v.

2,562.92 ACRES OF LAND, More or Less, situate in YUMA and MOHAVE COUNTIES, STATE of ARIZONA,

Defendant- Appellant.

NO. 72-2628

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

March 28, 1974

OPINION

Before DUNIWAY and WALLACE, Circuit Judges, and FERGUSON,* District Judge.

FERGUSON, District Judge:

* The Honorable Warren J. Ferguson, United States District Judge for the Central District of California, sitting by designation.

This is an appeal by the State of Arizona from a judgment in a condemnation proceeding awarding the Alamo Land and Cattle Co., Inc. monetary damages for its leasehold interests. We reverse.

The United States filed a condemnation action in the district court. Included in the property sought to be condemned were two parcels designated as tracts 304 and 305.

Those tracts are a part of the grant to the State of Arizona by the United States under the New Mexico-Arizona Enabling Act (Act of June 20, 1910, 36 U.S. Stat. 557, as amended June 2, 1951, 65 Stat. 50.) The lands were granted for the support of public schools and are subject to the restrictions set forth in § 28 of the Act, A.R.S.

Prior to the condemnation action the tracts had been leased by Arizona to Alamo under a ten year grazing lease.

After the filing of the action, Arizona and Alamo stipulated with the United States that the full just compensation for the taking of the two tracts, together with all improvements thereon, was the sum of $118,620.

Thereafter a distribution hearing was held by the district court. At that hearing the only parties who appeared claiming an interest in the award were Arizona and Alamo. Alamo claimed a compensable leasehold interest in the land as well as a compensable interest in the improvements. Arizona conceded that Alamo was entitled to receive the value of the improvements which Alamo had constructed on the property but claimed that Alamo had no right to participate in the award for any land value.

After the hearing, the district court awarded Arizona the sum of $57,970 for its fee interest in the

property and awarded to Alamo the sums of $3,600 for its improvements and $57,050 for its present leasehold interest as well as reasonably prospective future leasehold interest. We hold that Alamo is entitled only to the value of its improvements.

The Enabling Act and Section 28 are described and interpreted in Lassen v. Arizona Highway Dept., 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967). As stated therein "the Act described with particularity the disposition Arizona may make of the lands and of the funds derived from them. . . ." Furthermore, "the Act imposes two sanctions upon transactions which fail to satisfy its requirements. First, § 28 provides broadly that trust lands must be 'disposed of in whole or in part only in manner as herein provided . . .' It adds that 'Disposition of any of said lands . . . in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.' Finally, it provides that 'Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or conferred . . . not made in substantive conformity with the provisions of this Act shall be null and void' . . . ." 385 U.S. 462, 87 S.Ct. 586.

Arizona accepted the lands pursuant to Article X of its Constitution, A.R.S. Section 1 of that article provides that all lands transferred pursuant to the Enabling Act "shall be by the State accepted and held in trust to be disposed of in whole or in part, only in the manner as in said Enabling Act . . . provided . . . ."

The State of Arizona has argued that Alamo is not entitled to any compensation except for its improvements by reason of the following:

1. The lease specifically provided that:

a. It was made subject to the laws of Arizona.

b. In the event the State relinquished the property to the United States, then the lease shall be null and void as it may pertain to the land so relinquished.

c. No provision of the lease shall create any vested right in the lessee.

2. Sections 37-242 and 37-293 of the Arizona Revised Statutes restrict a lessee's participation in the proceeds of a sale of public land to the value of improvements.

We do not find it necessary, however, to determine the rights of Alamo based upon these lease provisions or the state law.

Section 28 of the Enabling Act provides in part: "Nothing herein contained shall prevent . . . (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee." That provision and other provisions of Section 28 which provide (1) the lands shall be held in trust (2) can be disposed of only as set forth in the Act (3) the money proceeds shall be held in trust (4) no mortgage or encumbrance shall be valid in favor of any person, for any purpose, or any circumstance whatsoever and (5) no lands shall be sold for less than their appraised value, require this court to hold that the district court was in error in awarding Alamo a part of the appraised value of the land.

This holding is specifically required by *Lassen* where the Court stated "[t]he Enabling Act unequivocally demands both that *the trust receive the full*

value of any lands transferred from it, and that any funds received be employed only for the purposes for which the land was given. . . . [I]t requires that before trust lands . . . are offered for sale they must be 'appraised at their true value' and . . . 'no sale or other disposal . . . shall be made for a consideration less than the value so ascertained. . .'" 385 U.S. 466, 467, 87 S.Ct. 588, 589. (Emphasis added.)

The Court then states "All these restrictions [in the Enabling Act] in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust." 385 U.S. 467, 87 S.Ct. 945.

The Fifth Amendment provides that private property may not be taken for a public use without just compensation. See United States v. Fuller, 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973). That provision would guarantee to Alamo the right to compensation if they had obtained from Arizona a property right superior to or equal to the trust. However, under the Enabling Act, Arizona, as trustee, had no power to grant a compensable property right to Alamo. Alamo therefore never acquired a property right for which it is entitled to compensation.

Alamo contends that Nebraska v. United States, 164 F.2d 866 (8th Cir. 1947) requires that school trust lands must be treated as any other private property and compensation for such lands taken by condemnation must be allocated or apportioned between the state and its lessee on the basis of their relative values. The court in that case held that the apportionment of the fair market value of lands which had been granted to Nebraska by its Enabling Act "for the support of common schools" must be the general federal rule of compensation for condemnation. Under that rule, the cash award must

be allocated or apportioned among the respective estates or interests on the basis of their relative values.

Nebraska v. United States, however, is not applicable here by reason of Section 28 of the Arizona Enabling Act as interpreted in *Lassen*. Furthermore, the Nebraska Enabling Act does not contain the express restrictions which are incorporated in the Arizona Act. United States v. 78.61 Acres of Land, 265 F.Supp. 564 (D.C.Neb.1967). Therefore Nebraska v. United States, *supra*, clearly is distinguishable.

The judgment of the district court awarding compensation to Alamo for its leasehold interests in the land is reversed, and the cause is remanded to the district court to enter a judgment in accordance with the provisions of this opinion.

APPENDIX B

CONSTITUTION

AMENDMENT V-CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV-CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Sec. 24. That in addition to sections sixteen and thirty-six heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any part thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to pre-emption or homestead, or improvement thereof with a view to desert-land entry has been made the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and Acts amendatory thereof or supplementary thereto,[1] are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: *Provided, however,* that the area of such indemnity selections on account of any fractional township shall not in any event exceed an area which, when added to the area of the above-named sections returned by the survey as in place, will equal four sections for fractional townships containing seventeen thousand two hundred and eighty acres or more, three sections for such townships containing eleven thousand five hundred and twenty acres or more, two sections for such townships containing five thousand seven hundred and sixty acres or more, nor one section for such townships containing six hundred and forty acres or more: *And provided further,* that the grants of sections two, sixteen, thirty-two, and thirty-six to

1 See 43 U.S.C.A. §§ 851, 852.

said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situated within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated.

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocabor substances on, in, or under lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be produced therefrom in paying quantities, the leases

to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less that 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee. As amended June 5, 1936, c. 517, 49 Stat. 1477; June 2, 1951, c. 120, 65 Stat. 51.

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid. As amended June 5, 1936, c. 517, 49 Stat. 1477.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, that said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character

named and in the manner prescribed in section twenty-four of this Act. As amended June 5, 1936, c. 517, 49 Stat. 1477.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder. Added June 5, 1936, c. 517, 49 Stat. 1477.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no land so reserved and excepted shall be subject to any disposition whatsoever of said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys

was by this Act conveyed or confirmed. No money shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the govenor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding. It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

ARIZONA REVISED STATUTES

§ 37-291

A. Upon application to the state land department

not less than thirty nor more than sixty days prior to the expiration of a lease of state lands, the lessee, if he is a bona fide resident of the state, shall have a preferred right to renewal, bearing even date with the expiration of the old lease, for a term not longer than ten years, as determined by the department, at a reappraised rental.

B. . . .If the department determines the continued leasing of the land not in the best interest of the state, the lease shall not be renewed.

§ 41-511.06. Eminent domain

A. In acquiring property by eminent domain, no water, watering facilities or water right of any person shall be taken separate and apart from the land served by such water, watering facilities or water rights, without fair and adequate compensation to be awarded for such land and water, watering facilities or water rights.

B. In seeking to establish a state park or monument on state or federally owned land, the board shall not request the termination or cancellation of any valid lease, permit, government land entry, mining claim, privilege or other right unless fair and adequate compensation is awarded to the holder of such lease, permit, privilege or other right. If the amount of the compensation cannot be determined by agreement, the board may proceed to cause such lease, permit, privilege, government land entry, mining claim or right to be terminated or cancelled if such can be lawfully done by the state or federal agency having jurisdiction thereof, or the board may proceed to acquire the same by eminent domain. In any event the holder of such lease, permit, privilege, government land entry, mining claim or right shall receive fair and adequate compensation for the cost of and damage to his property interest or loss of his lease, privilege, government

land entry, mining claim or permit. In determining the amount of such compensation, consideration shall be given to any preferential rights of renewal and other preferential rights of the owner or holder thereof, the damage to the remaining land, damage by access roads, and damage to the rights and operation which such owner may have and all other relevant factors. Added Laws 1957, Ch. 99, § 1.

APPENDIX C

TABLE 4.—*Grants to States, 1803-1972*

State	Purpose									Total
	Common schools	Other schools	Other institutions	Railroads	Wagon roads	Canals and rivers	Miscellaneous improvements not specified[1]	Swamp reclamation	Other purposes	
	Acres	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*
Alabama	911,627	383,785	181	2,747,479		400,016	97,469	441,666	24,660	5,006,883
Alaska	106,000	112,064	1,000,000						103,351,187	104,569,251
Arizona	8,095,156	849,197	500,000						1,101,400	10,543,753
Arkansas	933,778	196,080		2,563,721			500,000	7,686,575	56,680	11,936,874
California	5,534,293	196,080					500,000	2,193,966	400,768	8,825,107
Colorado	3,585,618	138,040	32,000				500,000		115,946	4,471,604
Connecticut		120,000								180,000
Delaware		90,000								90,000
Florida	975,307	182,160		2,218,705			500,000	20,331,617	5,120	24,212,909
Georgia		270,000								270,000
Idaho	2,963,698	386,686	250,000			324,263	209,086	1,460,164	654,064	4,254,448
Illinois	996,320	526,080		2,595,133	170,560	1,480,409		1,259,271	123,589	6,234,655
Indiana	668,378	436,080				321,342	500,000	1,196,392	25,600	4,040,518
Iowa	1,000,679	286,080		4,706,945			500,000		49,824	8,081,262
Kansas	2,907,520	151,270	127	4,176,329			500,000		59,423	7,794,669
Kentucky		330,000	24,607							354,607
Louisiana	807,271	256,292		373,037			500,000	9,504,476		11,441,096
Maine		210,000								210,000
Maryland		210,000								210,000
Massachusetts		360,000								360,000
Michigan	1,021,867	286,080		3,134,058	221,013	1,250,236	500,000	5,680,312	49,280	12,142,846
Minnesota	2,874,951	212,160		8,047,469			500,000	4,706,391	80,880	16,422,051
Mississippi	824,213	348,240		1,075,345			500,000	3,348,946	1,253	6,097,997
Missouri	1,221,813	376,080		1,837,968			500,000	3,432,521	48,640	7,417,022
Montana	5,198,258	388,721	100,000						276,339	5,963,338
Nebraska	2,730,951	136,080	32,000				500,000		89,680	3,458,711
Nevada	2,061,967	136,080	12,800				500,440		14,379	2,725,666
New Hampshire		150,000								150,000
New Jersey		210,000								210,000
New Mexico	8,711,324	1,346,546	750,000			100,000			1,886,848	12,794,718
New York		990,000								990,000
North Carolina		270,000								270,000
North Dakota	2,495,396	336,080	250,000						82,076	3,163,552
Ohio	724,266	699,120			80,774	1,204,114		26,372	24,216	2,728,862
Oklahoma	1,375,000	1,050,000	670,760							3,095,760
Oregon	3,399,360	136,165			2,583,890		500,000	286,108	127,324	7,032,847
Pennsylvania		780,000								780,000
Rhode Island		120,000								120,000

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TABLE 4.—*Grants to States, 1803-1972*—Continued

State	Purpose									Total
	Common schools	Other schools	Other institutions	Railroads	Wagon roads	Canals and rivers	Miscellaneous improvements (not specified)	Swamp reclamation	Other purposes	
	Acres	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*
South Carolina		180,000								180,000
South Dakota	2,733,084	366,080	250,640						85,569	3,435,373
Tennessee		300,000								300,000
Texas		180,000								180,000
Utah	5,844,196	556,141	500,160						601,240	7,501,737
Vermont		150,000								150,000
Virginia		300,000								300,000
Washington	2,376,391	336,080	200,000						132,000	3,044,471
West Virginia		150,000								150,000
Wisconsin	982,329	332,160		3,562,322	302,931	1,022,349	500,000	3,361,283	26,430	10,179,804
Wyoming	3,470,009	136,080	420,000						316,431	4,342,520
Total	77,629,220	16,707,787	4,993,275	37,128,531	3,359,188	6,102,749	7,806,995	64,916,260	109,780,866	328,424,871

APPENDIX D

INVENTORY OF LANDS HELD IN TRUST BY THE STATE LAND DEPARTMENT - SURFACE ACREAGE

	SCHOOLS AND INSTITUTIONS	TRUST LANDS GRANTED AND/OR ACQUIRED	INDEMNITY BASE LANDS NOT YET SELECTED		LANDS ON APPLICATION FOR INDEMNITY LIEU EXCHANGE AND/OR APPROVED FOR EXCHANGE		LAND OF UNDETERMINED OWNERSHIP	TITLE VESTED IN TRUST	NET GAIN OR LOSS INDEMNITY LIEU AND MISCELLANEOUS EXCHANGES	NET GAIN OR LOSS THROUGH TAYLOR EXCHANGES	TRUST LANDS AFTER SELECTIONS AND EXCHANGES
			OUTSIDE FOREST	INSIDE FOREST	OUTSIDE FOREST	INSIDE FOREST					
A 49	University	200,000.00						200,000.00	6.00	2,489.78	202,495.78
B 09	Legislative, Executive and Judicial Buildings	100,000.00						100,000.00	(6.96)	19.37	100,012.41
C 24	Penitentiary	100,000.00						100,000.00		(4.50)	99,995.50
D 06	Asylum for the Insane	100,000.00						100,000.00	1.88	(3.71)	99,998.17
E 40	School and Asylum for the Deaf, Dumb, Blind	100,000.00						100,000.00			100,000.00
F 15	Miners Hospital for Disabled Miners	50,000.00						50,000.00		1.20	50,001.20
G 21	Normal School	200,000.00						200,000.00		(10.95)	199,989.05
H 46	State Charitable, Penal and Reformatory	100,000.00						100,000.00			100,000.00
I 03	Agricultural and Mechanical Colleges	150,000.00						150,000.00		80.08	150,080.08
J 43	School of Mines	150,000.00						150,000.00		(31.21)	149,968.79
K 12	Military Institutes	100,000.00						100,000.00		(.52)	99,999.48
L 53	County Bonds	1,000,000.00						1,000,000.00		59.28	1,000,059.28
M 15	Miners Hospital for Disabled Miners	50,000.00						50,000.00		4,950.85	54,950.85
U 50	University of Arizona (Act of 2/18/91)	46,080.00						46,080.00	3,459.04	17,543.52	67,112.56
S 30	Common Schools (Original Grant)	8,334,952.00	(5,957.70)	(138,840.94)	(1,003.69)	(26,976.05)	(5,793.44)	8,156,380.18	(4,288,273.72)	(1,249,731.07)	2,620,375.39
N 31	Common Schools by Selections and Exchanges		(176.46)					(176.46)	4,289,397.83	1,258,771.44	5,547,992.83
	Territorial Prison	2,337.83						2,337.83	(38.48)		2,299.35
76	Cactus Gardens	2,876.71						2,876.71			2,876.71
TOTAL SCHOOL AND INSTITUTIONAL ACREAGE		10,786,246.54	(6,134.16)	(138,840.94)	(1,003.69)	(26,976.05)	(5,793.44)	10,607,498.26	6,575.81	34,133.56	10,648,207.63
GENERAL FUND											
58	Arizona Land Settlement	948.93						948.93			948.93
60	Farm Loan	22,237.77						22,237.77			22,237.77
64	Papago Park	1,185.14						1,185.14			1,185.14
65	Navigable Stream Beds	951.88						951.88			951.88
66	Non-Navigable Stream Beds	501.22						501.22			501.22
70	Special Grants - Airfields	6,670.64						6,670.64		(400.00)	6,270.64
80	Individual Grants - Airport Purposes	640.00						640.00			640.00
81	Lands Held in Trust - other State agencies	490.33						490.33			490.33
83	Lands Deeded to State Land Dept. as Trustee	161.00						161.00			161.00
TOTAL GENERAL FUND ACREAGE		33,786.91						33,786.91		(400.00)	33,386.91
GRAND TOTAL ACREAGE		10,820,033.45	(6,134.16)	(138,840.94)	(1,003.69)	(26,976.05)	(5,793.44)	10,641,285.17	6,575.81	33,733.56	10,681,594.54

Supreme Court, U. S.
FILED
SEP 26 1975

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-125

ALAMO LAND & CATTLE CO., INC.,

Petitioner,

-v.-

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT

OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 15, 1974

CERTIORARI GRANTED MARCH 17, 1975

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[RECORD 224-228]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. 2,562.92 ACRES OF LAND, more or less, Situate in Yuma and Mohave Counties State of Arizona; MICHAEL WEINER, et al., AND UNKNOWN OWNERS, Defendants.	)	No. Civ-6005 Phx WEC OPINION AND JUDGMENT

The above entitled cause is a condemnation action instituted by the United States for the purpose of acquiring certain lands in the construction of the "Alamo Dam" and related facilities. The United States filed its notice of condemnation on May 31, 1966, and an order for delivery for possession was duly entered by this Court. Included in the lands to be taken were two parcels designated as Tract 304 and Tract 305. Tract 304 is described as:

> All of Section 2, Township 10 North, Range 13 West, Gila and Salt River Base and Meridian, Yuma County, Arizona.

Tract 305 is described as:

> All of Section 36, Township 11

North, Range 13 West, Gila and Salt River Base and Meridian, Yuma County, Arizona.

The United States fixed a value on Tract 304 in the amount of $48,220, and on Tract 305 a value of $70,400, or a total of $118,620 for both tracts. The money has been deposited with the Clerk of the Court.

The parties in interest to this phase of the litigation are the State of Arizona, the owner of the two tracts, and Alamo Land and Cattle Company, Inc., the lessee of the two tracts.

The sole issue before the Court is the division of the funds on deposit, according to the respective interests of the two parties. Both parties agree that the total amount awarded by the United States represents the fair market value of the premises condemned for their highest and best use.

The State asserts that the present value of the improvements placed upon the premises condemned totals $3,600, and that the State is entitled to the full amount on deposit, less the amount of the improvements, which amount claimed by the State is $115,020.

Alamo asserts that, were it not for the condemnation proceedings, the premises in question would have been continuously leased to it by the State, and the true value of the premises would be reflected in the use of the premises in connection with other properties owned or controlled by Alamo as a cattle ranch; that the property would otherwise be, relatively, of no value.

While Alamo suggests a range of figures within which its interests are valued, it suggests a logical renewal of its leases over a thirty-six year period, and suggests the maximum value thereof

would be $78,620, with the remaining $40,000 as the value of the State's interest.

Alamo entered into a lease agreement with the State in February of 1962. At the time of the condemnation that lease had approximately six years of its term remaining.

The evidence at trial disclosed that the premises in question had for many years prior to release by Alamo been used in conjunction with other lands and cattle ranching operations. The physical location of the two tracts is in proximity to Alamo's "home ranch" or headquarters.

In its cattle operations, Alamo owned 1,064.98 acres of fee land. It had 43,333.97 acres of Taylor grazing land, and in addition had leases on the two parcels in question, commencing in February of 1962 and terminating in February of 1972.

Section 37-291, A.R.S. (1956) provides for a preferential right of renewal in a lessee of state lands, subject to reappraisal of the rental by the State. The statute just cited was carried forward in the 1956 Code from the Revised Code of Arizona of 1928. This preferential right of renewal was upheld by the Arizona Supreme Court in Ehle v. Tenny Trading Co., 56 Ariz. 241, 107 P.2d 210. The Arizona Supreme Court in Ehle held the preferential right of renewal to be "a valuable, substantial right." The Supreme Court of New Mexico in State, ex rel. State Highway Commission v. Chavez, 80 N.M. 394, 456 P.2d 868, reached a like conclusion. Nebraska v. United States, 164 F.2d 866, points up the requirement of the Fifth Amendment that just compensation for the fee lands taken must be allocated or apportioned among the respective estates or interests on the basis of their relative values. In addition to the statutory preference granted

lessees, it has been the custom of the Arizona State Land Department that, lacking any real change of use or potential change of use in the immediate future, state leases subject to renegotiated rentals are renewed.

Alamo suggests that it would be reasonable to contemplate three renewals of the existing lease. This would contemplate, in view of the remaining term at the time of condemnation, a continued use by Alamo for thirty-six years.

While the location of the two sections in question is in the arid west-central part of the State of Arizona, which is at best sparsely populated, this Court is of the opinion that a thirty-six year period is too remote for a sustained contemplated use.

Had it not been for the condemnation, there is little doubt that the existing lease would have been renewed in 1972 upon its expiration. Had it not been for the condemnation, it is undoubtedly equally true that it is highly probable that the renewed lease terminated in 1982 would have been again renewed for a succeeding ten-year period.

The value of lands in the arid southwest, to a considerable extent is determined by the availability of water. In the instant case the evidence discloses that there was not only water available through the use of the flow of the Bill Williams River, but could also be developed on the lands, themselves, and had in the past been developed to some extent.

From the evidence adduced at the trial, it is the conclusion of this Court that the State of Arizona is entitled to receive from the funds on deposit as compensation for its fee interest condemned the sum of Fifty-seven Thousand Nine Hundred Seventy Dollars; that Alamo Land and Cattle Co., Inc. is entitled to compensation for its leasehold interest at the time of taking, and its reasonably prospective

leasehold interest the sum of Fifty-seven Thousand Forty-nine Dollars; that Alamo Land and Cattle Co., Inc., is entitled to the further sum of Three Thousand Six Hundred Dollars as the present value at the time of taking of its improvements.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that from the One Hundred Eighteen Thousand Six Hundred Twenty Dollars on deposit with the Clerk of this Court, the Clerk shall pay to the State of Arizona as full compensation for its interest in Tracts 304 and 305 the sum of Fifty-Seven Thousand Nine Hundred Seventy Dollars; that Alamo Land and Cattle Co., Inc., is entitled to receive from the funds on deposit with the Clerk of this Court as full compensation for its leasehold interest and its improvements upon the lands in question the sum of Sixty Thousand Six Hundred Fifty Dollars.

DATED this 3d day of May, 1972.

/s/ Walter E. Craig
United States District
Judge

Copies sent to:
United States Attorney
State of Arizona, The Attorney General
Messrs. Renaud, Cook, Miller & Cordova

(The opinion of the United States Court of Appeals, Ninth Circuit, appears in the Appendix of Petitioner's Petition for Writ of Certiorari.)

(Defendant's Exhibit "B")
(Transcript 21, 22)

Lease No. C-2717

STATE LAND DEPARTMENT
STATE OF ARIZONA

GRAZING LEASE

THIS INDENTURE made and entered into this 8th day of February, 1962, by and between the State of Arizona, hereinafter called the lessor, and ALAMO LAND AND CATTLE COMPANY, INC., C/O SNELL AND WILMER, 400 SECURITY BUILDING, of Phoenix, State of Arizona, hereinafter called the lessee:

WITNESSETH, that the said State Land Commissioner, by virtue of the authority vested in him by law, and in consideration of the application heretofore made, and the covenants and agreements of this lease, hereinafter set forth, has this day leased to the said lessee the State Land, as hereinafter described, subject to any and all indebtedness that may be known to be due or that may be proven to be due hereafter.

TO HAVE AND TO HOLD the same for the period ending the 7th day of February, 1972, or date of sale, and subject to the conditions and reservations elsewhere set forth herein, for which lessee agrees to pay for each year, or fractional year, rental in advance as found to be due from the appraisals to be made from time to time by the State Land Commissioner, or his duly authorized agent, in accordance with the laws of the State of Arizona and the Rules and Regulations of the State Land Department.

IT IS HEREBY COVENANTED AND AGREED by both parties hereto, that this lease is issued subject to all the provisions and requirements thereto, which are found in the various Acts of the Legislature of the State of Arizona, the same as though they were fully set forth herein.

IT IS HEREBY FURTHER COVENANTED AND AGREED that all of the covenants, conditions and agreements, together with the description of the land included in this lease, contained in the supplemental sheet or sheets attached hereto shall be, become and are part of the lease, the same as though set forth in full over the signatures of the contracting parties hereto.

IN WITNESS WHEREOF, the Arizona State Land Commissioner, by virtue of the powers vested in him by law, has caused these presents to be executed by said lessor, at Phoenix, Arizona, on the day and year first above written, and the said lessee has hereunto affixed his signature at the place and on the day and year as set forth herein.

STATE OF ARIZONA,
LESSOR

By /s/ Obed M. Lassen
State Land Commissioner.

(SEAL)

By /s/ A. W. McGrath
Acting Deputy State
Land Commissioner.

Signed in the County of Maricopa, State of Arizona, on the 4 day of January, 1962.

(Sign Here) Alamo Land & Cattle Co., Inc.
Lessee.
by /s/ J. Michael

Andrews, Pres.

This lease is
issued in duplicate

STATE OF ARIZONA
LAND DEPARTMENT
GRAZING LEASE SUPPLEMENT

10 16 64
Mo Day Yr

ALAMO LAND & CATTLE
CARE SNELL & WILMER
400 SECURITY BLDG
PHOENIX ARIZ 85004

2717
Lease Number

COUNTY	Location Sec	Twnshp	Range	DESCRIPTION	ACRES	Beginning C.C.	FUND
14	2	10 N	13 W	L 1 2 & 3 S2 PT L4 S2N2	620.92	03	30 04
8	2	10 N	13 W	M&B IN L4 & SWNW	22.00	03	30 04
14	36	11 N	13 W	ALL	640.00	03	30 04

(Space for description, not used)

Lessee Signature: [signed]
Commissioner: [signed]
Deputy

DATE
11/2/64
DATE
Nov 2 1964

Total Acres
1282.92

STATE OF ARIZONA
LAND DEPARTMENT
GRAZING LEASE SUPPLEMENT

Mo Day Yr

Lease Number

(Space for Description Not Used)

AMENDED Nov. 2 1964

Lessee Signature: [signed] DATE 1-4-62

Commissioner: [signed] DATE 2-8-62
Acting Deputy

SUPPLEMENTAL CONDITIONS

(A) The lessee will not sub-let or assign the land herein described or this lease without the written consent of the State Land Commissioner, first obtained.

(B) The lessee will not permit any loss, nor commit or cause any waste in, to or upon said land; nor cut or remove nor allow to be cut or removed any timber or standing trees that may be upon said land, save and except only such as may be necessary for the improvement of said land, (and then only with the written consent of the State Land Commissioner) or for fuel for the domestic use of said lessee; provided that nothing herein shall be construed to permit the cutting of saw timber for any purpose.

(C) That the lessor excepts and reserves out of the grant hereby made, all oils, gases, coal, ores, limestone, minerals, fossils and fertilizers of every name and description that may be found in or upon the land herein described, or any part thereof.

(D) That the lessor reserves the right to execute leases covering the land herein described for the purpose of prospecting for, and the extraction of oil, gases, coal, ores, limestone, minerals, fossils and fertilizers.

(E) That the lessor also reserves the right to grant rights-of-way and easements over, across or upon the lands embraced in this lease for public highways, railroads, tramways, telephone and telegraph and transmission lines, pipe lines, irrigation works, flood control, drainage works, logging and other purposes.

(F) That if at any time after the execution of this lease, it is shown to the satisfaction of the State Land Commissioner, that there has been fraud or collusion upon the part of the lessee to obtain or

hold this lease at a less rental than its value, or through such fraud and collusion a former lessee of said land has been allowed to escape payment of the rental due for the use of said land by the former lessee, this lease shall be null and void, at the option of the State Land Commissioner, insofar as its relates to the land affected by said fraud or collusion.

(G) That if at any time after the execution of this lease, it is shown to the satisfaction of the State Land Commissioner, that the lessee herein has misrepresented, by implication or otherwise, the value of the improvements placed upon the land herein embraced by a former lessee, or any other person or persons and the lessee herein not being the owner of said improvements at the time of the execution of this lease, this lease shall be null and void, at the option of the State Land Commissioner, insofar as it relates to the land upon which said improvements are situated.

(H) That the lessor saves and reserves the right to relinquish to the Federal Government, at any time, the State's right or claim to any part of the land described herein, and thereupon this lease will be null and void insofar as it relates to the land the State has so relinquished.

(I) That if for any reason the State of Arizona should fail to receive title to any of the land described herein the State Land Commissioner shall cancel and declare void this lease insofar as it relates to the land to which the State has failed to receive title.

(J) If the lessee should fail to pay the appraised rental when due, or fail to keep the covenants and agreements herein set forth, the State Land Commissioner, at his option, may cancel said lease or declare the same forfeited in the manner provided by law.

(K) That the State of Arizona shall be forever wholly absolved from any liability for damages which might result to the lessee herein on account of this lease having been cancelled, forfeited, or terminated prior to the expiration of the full time for which it is issued.

(L) This lease is executed at the request of the lessee upon condition that lessee will pay such rental as may be fixed by the State Land Commissioner from time to time as now provided by law, or such as may be enacted hereafter, and that he will pay in accordance with the provisions of law for any improvements placed upon said land by a prior lessee thereof.

(M) Before the lessee shall exceed the 110% of the appraised carrying capacity as determined under sub-paragraph (f) Section 11-301 of Chapter 58, First Special Session 19th Legislature, he shall obtain written permission from the State Land Commissioner and pay the additional fees as provided by law.

(N) It is understood by the lessee that the establishment of any water right, or rights, shall be by and for the State of Arizona, and that no claim thereto shall be made by said lessee; such rights shall attach to and become appurtenant to the said land.

(O) If the lessee desires to place improvements on the land described herein the approval of the State Land Commissioner must first be obtained.

(P) This lease is offered by the lessor and is accepted by the lessee with the express understanding, not withstanding any provisions herein to the contrary, that it may be terminated by the State Land Commissioner upon thirty (30) days written notice at any time as to any land which may be reclassified as agricultural, commercial or homesites.

The State Land Commissioner expressly reserves complete discretion in respect thereto.

(Q) The terms, conditions and covenants of this lease are subject to present laws relating to state lands and the rights of both lessor and lessee hereunder, are each and all subject to such modifications as may be consistent with such amendments, revisions or repeals of existing laws as may hereafter be made, and no provisions of this lease shall create any vested right in the lessee herein.

* * * Blank Assignments.

(Defendant's Exhibit "D")
(Transcript 85, 95)

DEPARTMENT OF THE ARMY
U. S. ARMY ENGINEER DISTRICT, LOS ANGELES
CORPS OF ENGINEERS
P. O. Box 17277, Bay Station
Los Angeles, California 94017

Alamo Dam, Arizona - State Land — 1 February 1965

MEMORANDUM APPRAISAL

Introduction:

This estimate covers State land as follows:

Gila and Salt River Meridian, Yuma and Mohave Counties, Arizona.

T. 11 N., R. 12 W., sec 16	640.00 acres (Tract 307)
T. 11 N., R. 13 W., sec 36	640.00 acres (Tract 305)
T. 10 N., R. 13 W., sec 2	642.92 acres (Tract 304)
Total	1,922.92 acres

These are separate parcels although sections 2 and 36 have a common corner and both are leased by the Alamo Company. Section 16 is leased by Chester Fuller, who also operates, and is a 30% owner, in the Alamo Company.

All three sections have lessee-owned improvements.

The moveable improvements Mr. Fuller salvaged from Tract 307 (sec. 16) and the 15 acres of bottom land clearing (covered by another appraisal) are not covered here. The grading and ditching by the lessee on Tract 307 (sec. 16) are included here.

All existing improvements are covered on section 2 and 36 (Tracts 304 and 305, respectively).

Purpose:

The purpose is to appraise the fair market value of the entire bundle of rights conveyable by the State and the State's lessees.

Certification:

I certify that I investigated the value and last inspected the properties with Mr. Chester Fuller, 29 January 1965. My estimate of fair non-federal market value is:

$169,820

I also certify that I have no present or intended interest in the properties.

/s/ Robert A. Rowe
Robert A. Rowe
Appraiser

Attachments:
Ltr, Fuller to LADO 11 Jan 65
Sales Map.

Location and General Discription:

This area is an oasis in the desert formed by two flowing streams which drain higher, more humid, mountainous areas.

The three sections of State land involved in this estimate extend to the river valley floor in each case. The Big Sandy Creek and Santa Maria Rivers join within the proposed reservoir area about 46 miles east of the Colorado River. They form the Bill Williams River, which extends from that confluence westerly to the Colorado River immediately above Parker Dam. That Dam is located about 180 miles upstream from the mouth of the Colorado River and about 150 miles downstream from Hoover Dam.

The Bill Williams River has a drainage area of approximately 5,500 square miles, 4,000 of which is above the proposed dam, which basin lies in the west central portion of Arizona, within Yavapai, Mohave, and Yuma Counties

The proposed dam and control basin reservoir include land in the latter two counties. The dam, as planned, is to be located about 39 miles upstream from the mouth of the Bill Williams River.

Access:

There is no direct access upstream from the mouth of the Bill Williams River to the dam site or basin. A new hard-surfaced road from the south at Wenden, Arizona, has now been completed by the Los Angeles District Office. There is a sandy, graded road, westerly from Congress Junction, which small town is a slightly greater distance from the dam site or crossing than is Wenden.

There are two roads, south from Highway No 66

to the basin. This highway is the main Los Angeles-Needles-Flagstaff-Albuquerque Highway, which is designated as a transcontinental defense route. None of these dirt roads are to be relied upon after rainstorms have occurred. Since 1953, Alamo Crossing is not the major route across the river. At that time the manganese Mills were established at Brown's Crossing, upstream from the old Alamo route.

This upstream location is on soil and slope which makes it useable by passenger cars when it is impossible to ford the stream at the old Alamo Road.

There is a filling station and cafe at Brown's Crossing, whereas there is nothing in use at Alamo Crossing other than a group of minimum residences which are often not occupied.

There is no public transportation nearer than the three points of road access mentioned.

Alamo Dam, Arizona -
State Land

Climate:

The closest Weather Brueau records were taken at Signal, at an elevation about 400 feet higher and about 12 miles northerly of Alamo Dam. The yearly maximum temperature varied from 110 to 120 degrees Fahrenheit. The average daily maximum temperature was about 105° and the average daily minimum was 73°.

The average rainfall was about six inches per

year.

The general area is windy and dusty, but the river bottom trees provide local protection.

Topography:

There are steep mountains on the major plateaus out of the river valley and there are precipitous cliffs near the valley, but the general area does not vary greatly in basic altitude. The Bill Williams River has a rather flat bed with a 16-foot drop per mile.

The Big Sandy Creek and Santa Maria River both fall at about twice that rate.

All three of the State sections extend from the valley floor upslope to the south.

Soils:

The soils in the region vary greatly and are moderately alkaline in general. Diked irrigated pasture which has been in use for some time ordinarily shows a pronounced alkaline condition. The density of vegetation is controlled by moisture rather than by soil. There is sub-irrigation in the valley floor. The bottom lands are cultivated, but dependency is upon irrigation for crop production. There is no more than 100 acres of good agriculture soil within any of the State sections. New clearing of part of the better soil has been done on both sections 16 and 36.

Water Supplies:

Irrigation in the general area is from wells with related overnight reservoir storage, from sumps supplied by underground water flows, and from gravity flow irrigation ditches. There is some sprinkler irrigation. Until recently, there was

only one major form of irrigation. The water was turned out of the dam bed and diverted along the upper edge of the relatively flat bottom land located downstream. It was spread out by a process usually called flood irrigation. Each of these three State Sections have been irrigated in part by a flooding system at various times in the past. There have been domestic wells on each and there are two springs on Section 36. One of these has been used for domestic water supply for many years and both of them have been used

Water Supplies: (cont'd)

continually for livestock water. These springs are valuable, partly because livestock may be contained near the spring even when the rivers were flooding and consequently washing fences away.

Present Use:

The only present major use of the reservoir area is for three operating cattle ranches. The Alamo Land Company leases State sections 2 and 36 (Tracts 304 and 305) and Mr. Chester Fuller leases section 16 (Tract 307). The third rancher, Mr. Madrill, has made use of water from section 36 (Tract 305) spring and his employees and relatives have occupied residences on that section by permission of the Alamo Land Company (the lessee). There has been some bird and mammal hunting in the area. Quail hunting is particularly attractive. There are fishing pools upstream

from section 16 (Tract 307).

Highest and Best Use:

The bottom land's highest and best use is for agricultural and recreational activities, and its usefulness is enhanced as a result of the fact that hay or irrigated pasture may be substituted for forage which otherwise would have to be hauled in, in order that livestock breeding nuclei could be maintained during dry periods.

The higher, more barren, land has very little present usefulness except for grazing and other minor value uses associated with the developed valley floor.

Since livestock are pastured on the adjoining desert areas, the crop or irrigated worth is local in nature. At the river, the dry season insurance type forage is the price, in Phoenix plus the transportation from that city, rather than its worth (in the case of hay) at Phoenix, less the transportation from Alamo. There is not sufficient local need for any expanding of irrigated forage production now apparent. If cotton were produced, there would be no local market and there is little residual livestock forage value in that crop, but there are no cotton allotments, consequently cotton production does not figure as highest and best use.

There are nearby mining activities but these are very minor at this time and the market situations which caused greater activity in the past are not expected to recur.

State Land:

The present acquisition planned consistent with both Design Memorandum No. 1; and the as yet unapproved, Design Memorandum No. 3,

includes three State-owned sections in their entirety. There are compensable interests held by lessee in this property. They include ditching, clearing, grading, fence, a residence, and water developments.

The State Land Department has frozen additional lessee improvements.

Alamo Dam, Arizona -
State Land

History:

Alamo Crossing is reported to have had a store and a few houses in the 1880's, where there was considerable mining activity in the area. However, there was a Spanish settlement before this was a part of the United States, and there was a flour mill near the crossing at that time; grapes were grown; and there was a relatively self-sustaining community. Its cash income was not agricultural but mineral. Mines were productive over a considerable number of years northerly in a copper area, but gold was the interest-causing mineral in the valley until the occurance of the manganese development of approximately 10 years ago. This activity has now reached a quiet stage.

Travel up and down the Bill Williams, Santa Maria, Big Sandy River System was advantageous 100 to 150 years ago, because this stream was one of the two rivers flowing continuously from east to west through southwesterly Arizona. Human and horse forage and water were available at all seasons in this valley. Bill Williams, a trader,

explorer, trapper, and missionary traveled this route and gave the river his name. His diaries include data on water flow and agricultural productivity.

New mineral claims were restricted in the valley during territorial days by withdrawal of a "Power Site" reserving mineral interests to the Government, including "all lands located within one mile of either bank of the Bill Williams River, beginning at Planet and extending 20 miles up river from that point". A later (1927) "Power Site" withdrawl reserved specifically described land as to filing of claims for mineral. These withdrawals, as well as Public Land Order 492, for the Alamo Reservoir, affect the validity of mineral claims.

Agriculture is spotty in that it is confined to these areas where the river valley is wide enough for crop production out of the main channel and below the walls of the general depressed valley. The agricultural islands below the dam site are between River Mile 20 and Mile 36 at Planet and the Lincoln Ranch. The latter ranch was purchased in 1961 by the Dale Smith Interests of Chandler, Arizona. This ranch was once irrigated by gravity flow from the Bill Williams River. Diversion tunnels were blasted through the walls of the canyon below the locations of the planned dam. Irrigating water is now pumped from wells located within the farming area and from the stream. An ordinary market assumption in the locality is that water rights by stream diversion have been abandoned. Also, since well drilling and pumping have become more practical, such diversion is uneconomic.

The beginning of the manganase development and the establishment of the mills on the Mohave County (or northerly) side of Brown's Crossing upstream about three miles from Alamo Crossing

was coincidental with the establishment of the filling station and store on the Yuma County side of the same crossing.

Alamo Dam, Arizona -
State Land

History: (cont'd)

A post Office had been opened at Alamo Crossing about 1913, but was closed two or three years later. As mining declined, most of the buildings, which had not been destroyed by floods, were torn down for the salvage materials. Cattle raising then became the main source of income, although some mining activity existed continually. The sparse population of the area now consists of a few ranchers, miners, and retired people. There are no residential concentrations within the taking area, although there are both temporary and permanent residents in this area from just below Alamo Crossing to just above Brown's Crossing, which area is within sections 34 and 35 in T. 10 N., R. 13 W., and sections 7, 18, 19, and 20, in T. 11 N., R. 12 W. The value of the irrigated land has decreased as far as having usefulness in connection with mineral development in that garden and other feeds have been brought in, rather than produced locally in recent years; however, agricultural land value has increased and has been a stablizer for the livestock industry. There are years and portions of years of very high production of native valuable livestock forage produced in the adjacent desert areas, which are largely Public Domain. Permanent ranches, however, are based upon property which will maintain livestock in dry seasons or,

at least, maintain the basic breeding herds until more favorable circumstances for forage production occur. Consequently, base land has value outside of its productivity as compared to general agricultural areas where price per ton of forage per acre can be prorated as a direct value. Here hay may keep animals alive, or irrigated pasture may make it possible to make use of desert forage at a later date, which forage will actually produce a considerable profit in that rapid gains are made at little cost to the livestock owner.

Farm land in this isolated type of oasis, therefore, is not readily comparable with major areas of irrigated hay and pasture production. Also, from a valuation point of view, it is a somewhat involved process to value irrigated land since in civil acquisition, it is not possible to pay for grazing permits or licenses on Public Domain administered under the various features of the Taylor Grazing Act of 1934. In other civil acquisitions in Nevada and Arizona, this fact has been noted. However, the trend of desert ranch values still affects the trend of irrigated land values because of the inter-relation of the two.

A buyer would consider what usable desert values he would acquire as a result of securing the stabilizing permanent value headquarters usefulness in an irrigated hay and pasture production area. Consequently, the market value of these riverbed lands is inseparable from their usefulness in connection with the dry grazing areas on both sides of the river, which desert areas are useful only when water, livestock control, and dependable forage can be relied upon. It is relevent to note that commensurate permit values under the Taylor Act in Arizona and part of Nevada, contrary to the situation in all the rest of the western states, are based upon water, not primarily upon land holdings, and the water in the river and nearby springs is definitely related

to the fee ownerships thereon, although there are numerous points at which Public Domain intersects the river.

Alamo Dam, Arizona -
State Land

History: (cont'd)

The interest in recreational value in any oasis area is increasing rapidly throughout Arizona. The general livestock net profit situations have been adverse to ranch values since 1951. However, the demand for unimproved ranch property has been favorable as a result of tax savings to those people in the higher income brackets; consequently, there has been a very attractive feature to Southern Arizona properties in that connection. Details are available in this regard.

Actual results of tax regulations are a near costless ownership within a ten-year period, at which time the property can be sold with only Capital Gains Tax being paid, so that the financial return to the person having outside interests, who purchases this undeveloped land, is based upon a different viewpoint than that of ranchers who have no other businesses and are in the lower income tax brackets. Examples of this in the specific area include the Lincoln Ranch and James Minotto Ranch. The cutoff date for most advantageous improvement depreciation is 1 January 1964 however.

Taxes:

Unimproved land is taxed by both Counties at

$1 - $5 per acre.

There is no nearby school in either County. The tax rate is about 3¢ in Mohave County and 5¢ in Yuma County.

Tax valuations are not up-to-date. They do not reflect recent land clearing and water distribution facilities.

Discussion of Leasehold Bargain in State Land:

This discussion is based on experience as an appraiser with State land leasing market in several western states together with past and current management in Colorado and Arizona.

The general situation is that state land grazing leases are considered to be a bargain almost without exception in all states but California. Minimum charges have been too high for the demand for the poorest grazing land held by the State in California. Even here, however, grazing land with existing water supply or favorable indication has been in good demand even under the poorest livestock price and cost situation. All three of the State sections with which this estimate is concerned have water actually present and good prospect for additional supply.

One of the factors which has made State land a bargain as compared to Federal land leases and permits has been elegibility under the National Agricultural programs. AAA, ASC, and related payments have been paid regularly for water development, drift fencing, water distribution by level terracing or contour furrowing, legume planting, offset disk sodbreaking, pitting, brush chaining or railing, plant control by chemical means, and many other practices.

Discussion of Leasehold Bargain in State Land: (cont'd)

On U. S. Forest grazing permits and leases; on U. S. Bureau of Land Management grazing leases and permits; and on U. S. Bureau of Reclamation grazing transactions the Federal Agricultural programs have not considered Federal land as an eligible category. Other Federal help through S&M funds and refund proration of permit fees has not been comparable to the agricultural programs as to amount and availability of money or proportion of grantee contribution.

Under that situation State land subject to development has been in much greater demand than has been the case on Federal grazing leases and permits.

Tenure has been stable even when the leases have cancellation clauses and termination dates. Preference for renewal has been both officially sanctioned and practiced as a custom.

Tract 304 (sec. 2)

This section is leased to the Alamo Land Company.

A well has been drilled and roads and trailer pads have been constructed on this section. This work has been done by Government in preparation for the Alamo Dam construction. None of this construction is reflected in this value estimate. However, the result of the well drilling at the edge of the Bill Williams River does tend to confirm the reports that the old well dug near these provided enough water for a garden and horse pasture over many past years.

The two section corners of the south were found.

The two northerly corners were not located, but the easterly line was eyeballed from the 1/4 corner common to sections 35 and 36, which corner is 1/2 mile northerly of the assumed location of the northeast corner of section 2.

There is about one mile of lessee-owned fence on the section, but it is not intended to be on any boundary. It is located where it would confine cattle, could be constructed at low cost, and would not require excessive maintenance as a result of flood caused erosion.

The major portion of section 2 is valuable for crop and pasture production. The only good soil which is fairly level is also quite close to the river bottom and consequently difficult to farm, even if some portions are not subject to frequent flooding.

The valuation basis is upon the following factors:

a. A certain water supply within section 2, but at the lowest elevation,
b. Only 10 acres of crop land and clearing required before use.

c. Fair access from north and from southeast prior to Government road construction.
d. View of river bottom from above.

Recreational oriented homesite would be the best market.

Hunting, both technical and popular geological study, and historical interest are attractive features for potential residents.

Tract 304 Estimated Value of Total Non-Federal Bundle of Rights is:

642.92 acres @ $75 = $48,219
(including all lessee's interests) R.O. $48,220*

Division of Lessee's Interest Market Value on Transfer:

Old Well	$100
1 mile new fence (3 yrs old) (not on boundary)	$500*
4-strand barbed wire with metal posts at 30' intervals; 3 wire stays between posts; (3 yrs old)	
Leasehold bargain due to formula rental being below market (carrying capacity unit and percent of last year's cattle price)	$200
Total Lessee's Interest:	$ 800*

Total Interest of the State: $47,420

($73.76 per acre)

*If this fence is relocated as requested in January 1965 letter, Chester Fuller to Colonel Peacock, this $500 item should be omitted.

Tract 305 (sec. 36)

This section of State land is leased to Alamo Land Company.

The two all-weather springs are the most unusual features of this section of land.

The northwest corner of this section 36 is on the south side of the old Alamo Crossing.

Tract 305 (sec. 36) (cont'd)

The west quarter corner is at two _____ (unreadable) rocks on the trail road leading south. The new fence is inside (easterly of the west boundary) of the section line. There are no other fences. The total fence is slightly in excess of one mile. It is new, 4-strand barbed wire, with metal posts at 30-foot intervals, with three wire stays per panel.

There is an old residence and concrete cook house in the NE¼ NW¼. There is a water flow from springs just easterly of these buildings in the same quarter section. This spring water supply

has been the source of a gravity flow water supply for the split level house often referred to as the Sherman or Allen house. The property has been used intermittently. The cook house was built in the early fifties when an ore mill superintendent lived there.

There is another live spring a short distance easterly from the west quarter corner.

There is a bee stand shelter, of no value, located on the SW¼ NW¼.

The Government has built and/or improved over 1½ miles of road on this section. Part of the excavation for borrow material testing for the dam is on the NW¼ NW¼. No advantage or disadvantage resulting from these Government activities are reflected here.

There have been preliminary clearing activities by the lessee, the Alamo Land Company, but debris removal was not complete because of the freeze put on development as a result of a 1961 conference of LADO and the Arizona State Land Department representatives.

Mr. Fuller stated, 29 January 1965, that he paid $5,000 for the house, cook house, spring development, pipe line, and leasehold bargain when he agreed to buy the Ellsworth Ranch in 1960. The 1-miles of fence was put on after that time. The water system has deteriorated within the house, but the water flow is still working to and beyond the house. The flow from the spring is down grade on a protected side of the wash so that reliability and maintenance cost are favorable.

The major value of this section is its residential, ranch headquarters, speculative recreational value, and reliably predictable multiple usefulness.

All of this is directly related to the two proved flowing springs located where erosion from high ground or from the river bed cannot occur. The water quality and the dry season flow are both well proved over many years. Such sites are extremely scarce and in considerable demand.

Alamo Dam, Arizona -
State Land

Tract 305 (sec. 36) (cont'd)

Tract 305 Estimated Value of
Total Non-Federal Bundle of Rights is:

640 acres @ $110 per acre (including all lessee's interest)	$70,400*

Division of Lessee's Interest Market Value on Transfer:

House, cook house, spring development, and pipe to house.	$2,000
Fence (over 1 mile 4-strand barbed wire with metal posts at 30' intervals; 3 stays between posts) . .	$ 500*
Clearing - 10 acres @ $50 per acre. .	$ 500
Bargain in leasehold	

resulting from less
than market charge
on formula rent (based
on carrying capacity
and percent adjusted
for market price of
cattle prior year. $3,000

Total Lessee's Interest: . . . $ 6,400*

Total Interest of the State: . $64,400
($100+ per acre)

*If this fence is relocated as requested in January 1965 letter from Mr. Chester Fuller to LADO, this $500 item should be omitted.

Alamo Dam, Arizona -
State Land

Tract 305 (sec 36) (cont'd)

Detail on Building:

The dwelling shown in the snapshot below is deteriorating rapidly. It is split level rock and frame with metal roof. Largest space enclosed on top level is 640 square feet. Cook house is all frame - 140 square feet. Water supply is in poor order, but supply is proved.

[PICTURE]

Alamo Dam, Arizona,
State Land

Tract 307 (sec. 16)

Structures and clearing of 15 acres have been appraised and will be conveyed separately, by agreement made prior to the effective date of this appraisal. Removal of structures, at the salvage value, is planned, but the items of property had not been removed on the date of the last inspection (29 January 1965). The clearing, of course, can not be removed.

The ditching was abortive, intended for two purposes; (a) to distribute water for a sloping pasture, (b) to lead to a proposed lake at a location which could have been completed by moving a small yardage of soil a short distance.

The water source was on adjoining fee land so neither project was to be completed within the State-owned section 16 (Tract 307).

Only a small part of the 640 acres had soil which could be levelled to advantage. The most level portion is subject to flooding. The northeast corner marker has apparently washed away or been covered with silt and debris.

The combination of pasture and level crop land which might be irrigated from a well on the tract would not justify the cost of the well together with the cost of pumping southerly up-grade either for sprinkle or flood irrigation. Even after allowing for extra value of plottage within the ranch, the total value is less for agriculture than is the probable market for recreational homesite use. Pumping water up-grade for domestic use would be economical.

The view is good north from the upper (southerly) slopes, the drainage is good, and the immediate access development costs are very little. Grazing production would be more feasible for resident's riding horses than for production of beef animals.

Alamo Dam, Arizona -
State Land

Tract 307 (sec. 16) (cont'd)

Tract 307 Estimated Value of Total Non-Federal Bundle of Rights is:

640 acres @ $80 (including all lessee's interests remaining

after his buying improvements to move to new headquarters on other State land already contained within his ranch)			$51,200
Division of Lessee's Interest Market Value on Transfer:			
Grading - 20 acres (amounts to smoothing slope)	$100		
Road	$ 75		
Preliminary work on Ditching	$120		
Total improvements (marketable by lessee)		R.O. $300	
Bargain leasehold particularly because of providing a profitable use area for water from fee land (20 acres @ $10)	$200		
Result of less than market charge on formula rent (based on carrying capacity and percent adjusted for market price of cattle in prior year)	$300	$500	
Total Lessee's Interest:			$ 800
Total Interest of the State:			$50,400

($78.75 per acre)

Supporting Data:

See sales location on attached map.

Sale No. 1:

Legal Description:	Mohave County, Arizona, G&SRM, T. 14 N., R. 12 W., sec 19, E½ SE¼
Acreage:	80 acres
Location:	About 6 miles southeast of Wikieup on Burro Creek (it has previously been reported as SW of Wickieup).
Date of Sale:	Deed dated 5 March 1964; recorded 26 August 1964; Book 163, page 282
Granter:	Dean W. Coffman, 23 West 6th Avenue, Scottsdale, Arizona
Grantee:	William Munz, Box 639, Nome, Alaska

Alamo Dam, Arizona -
State Land

Supporting Data: (cont'd)

Sale No. 1: (cont'd)

Verified By:	Mr. Dean W. Coffman by telephone, 2 February

1965, at 945-5749.

Terms: Cash

Price: $50 per acre

Improvements: None, but land included Burro Creek water, and power and road are to the land.

Remarks: W½ and W½ SE¼, same section, is listed with Flying K Realty, Kingman at $100 per acre.

Sale No. 2:

Legal Description: Mohave County, Arizona, G&SRM. T. 11 W., R. 12 W., sec 10; E½ SW¼, SE¼ SW¼, SW¼ SE¼

Acreage: 155 acres

Location: On north side Santa Maria River, having common corner with subject section 16

Date of Sale: 18 April 1961, recorded 25 April 1961, Book of Deeds 112, page 244, Mohave County, Arizona

Grantor: Gordon Olea

Grantee: Chester and Maxine Fuller, h/w

Verified By: Chester Fuller

Terms: Equivalent to cash

Price: $103.22 per acre - $195 per farmable acre when developed

Improvements: Well not in order, old adobe house, and broken down corral - no value except that well record indicated shallow water with slow draw down.

Remarks:	About 10-12 acres were actually farmable when bought, but water supply and clearing have been added.

Sale No. 3:

Legal Description:	Mohave County, Arizona, G&SRM. T. 14 N., R 12 W., sec 14; that portion of E½ NW¼ lying north of the center of the Santa Maria River as located when surveyed.
Acreage:	30 acres (has been mentioned at 20 without checking G.L.O. Survey)
Location:	Just northwest of subject sec. 16
Date of Sale:	15 August 1961, recorded 19 September 1961; Book of Deeds 117, page 152
Grantor:	Gordon Olea
Grantee:	Chester and Maxine Fuller, h/w
Verified By:	Chester Fuller
Terms:	Equivalent to cash

Supporting Data: (cont'd)

Sale No. 3: (cont'd)

Price:	$57 per acre overall average (based on 30 acres - not 20 acrea); or $170 for 10 acres irrigible).
Improvements:	None except land clearing.
Remarks:	The buyers apparent motive was blocking of holdings

Sale No. 4:

Legal Description:	Yuma and Mohave Counties, Arizona, G&SRM; T. 11 N., R 16 W., sec 32; NE¼, E½ NW¼, NW¼ NW¼, E½ SE¼ and SW¼ SE¼
Acreage:	400 acres
Location:	On both sides of the Bill Williams River about 23-27 miles west of subject sections.
Date of Sale:	16 January 1963 for Certificate of Purchase, recorded 22 November 1963, Docket 314, page 149
Grantor:	State of Arizona
Grantee:	G. L. Gibbons for Arizona Ranch & Metals Co.
Verified By:	Charles Poole of Arizona Ranch & Metals Co. at plant
Terms:	$20,000 for the parcel with $2,000 down and balance over 25 years @ 5%
Price:	$50 per acre for land with $12.78 more per acre for improvements
Improvements:	$4,600 improvements already owned by Arizona Ranch & Metals Co.
Remarks:	The access to Parker,

	Arizona is superior to the access to Wickenburg from subject sections 2, 16, and 36. It is 24 miles to Parker by the best road. About 3/4 of the area is farmable now, but needed clearing when bought.
Buyer's Motives:	This is a blocking purchase in anticipation of less flooding when Alamo Dam is completed.

Sale No. 5:

Legal Description:	Yuma and Mohave Counties, Arizona, G&SRM, T. 11 N., R 16 W., sec 36; all
Acreage:	640 acres
Location:	20 - 24 miles west of subject parcels on both sides of Bill Williams River
Date of Sale:	16 January 1963; recorded 22 November 1963, Docket 365, page 359
Grantor:	State of Arizona
Grantee:	Arizona Ranch & Metals Co.
Verified By:	Mr. Charles Poole of Arizona Ranch & Metals Co.

Supporting Data: (cont'd)

Sale No. 5: (cont'd)

Terms:	Usual State 10% down on land and 5% on balance due.
Price:	$50 per acre for land, or $63.75 total cost.
Improvements:	Owned by the buyer
Remarks:	This was a proved water area prior to this sale. The buyer's well was on fee ownership on sec. 35 about 15 feet from the State's boundary. The access to Parker was shorter than any of the subject State sections' access to Wickenburg.
Buyer's Motives:	This is a blocking purchase in anticipation of less flooding after Alamo Dam is completed.

Sale No. 6:

Legal Description:	Mohave County, Arizona G&SRM, T. 11 N., R. 16 W., sec. 21: all
Acreage:	640 acrea
Location:	North side of Bill Williams River
Date of Sale:	5 June 1962; recorded 20 July 1962, Book of Deeds 126, page 76, Mohave County
Grantor:	Marvin L. Miller and wife;

Grantee:	Michael S. Neehes and wife; Howard A. Barnett, and Robert M. Scholnik and wife.
Verified By:	Arizona Ranch & Metals Co.
Terms:	Charles Poole of Arizona Ranch & Metals Co.
Price:	Equivelant to cash
Improvements:	$42.97 per acre
Remarks:	This land is raw, near farming land. Has road to Kingman, Arizona passing by.
	Less isolated from a good center (Parker) than the subject sections 2, 16, and 36. Is more level than they are.

Sale No. 7:

Legal Description:	Yuma County, Arizona, G&SRM; T. 10N; R. 14 W., sec. 5: SW¼ sec. 6: 300' x 700' and E½ SE¼
Acreage:	235.18 acres
Location:	12 - 15 miles west of subject sections 2, 16 and 36.
Date of Sale:	Sales Agreement 9 August 1963, recorded 14 August 1963; Docket 359, page 39
Grantor:	Lawrence D. and Burley Mae Johnson, h/w
Grantee:	Robert J. and Lola M. Rankin, h/w

Supporting Data: (cont'd)

Sale No. 7: (cont'd)

Verified By:	Mrs. Rankin
Terms:	Liberal; 1/4 down and $3,000 per year plus 6% on unpaid balance.
Price:	$160 per acre; well value in land, house no commercial value
Improvements:	Small rock house (no commercial value); road, well, and irrigation ditches and clearing.
Remarks:	The well, clearing, and irrigation ditches are all reflected in the land.

Sale No. 8:

Legal Description:	Yuma County, Arizona, G&SRM; T. 10 N., R. 14 W., sec. 4: SW¼ SW¼ sec. 5: N½ SW¼ sec. 9: W½ NW¼
Acreage:	200 acres
Price:	$40 per acre
Location:	South side of Bill Williams River; 10-14 miles west of subject sections 2, 16 and 36
Date of Sale:	21 October 1963; recorded 23 October 1963; Docket 363; page 617, Yuma County
Grantor:	Thomas F. Tobin

Grantee:	Samuel F. and Winnie A. Mitchell, h/w
Verified By:	Mr. Mitchell
Terms:	Equivalent to cash
Improvements:	None, except jeep road
Remarks:	The last part of the road is poor in comparison to the subjects', which were also subject to flood closing.

Summary:

The appraiser has detailed knowledge of large ranch sales, including those which included leasehold on these three sections of State land. They were both distress sales having little bearing for that reason as well as being unrepresentative because such Public Domain grazing permit preference right (commensurability) was dependent on water supply from fee and other land, including this State land. The sales above are superior to any others found as a basis of comparison because of water, access, size, soil, and all other demand and supply factors.

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Petitioner and Respondent agree to the above contents of the single Appendix.

ALAMO LAND & CATTLE CO., INC., Petitioner

By _____
J. Gordon Cook

STATE OF ARIZONA

By _____
Peter C. Gulatto
Assistant Attorney General, Respondent

Supreme Court, U.S.
FILED
AUG 15 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-125

ALAMO LAND AND CATTLE CO., INC.,

Petitioner

vs.

THE STATE OF ARIZONA,

Respondent

BRIEF FOR THE WHITE SANDS RANCHERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

HINKLE, BONDURANT, COX & EATON

By _____

Attorneys for Amicus Curiae,
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INTEREST OF THE ASSOCIATION

The White Sands Ranchers Association is an informal association of ranchers whose ranch properties are embraced within the White Sands Missile Range in New Mexico. The association was formed to achieve unity in defense of pending condemnation suits filed by the United States for use of such ranches for a term of years ending June 30, 1980. The ranchers in this association have grazing leases on a substantial portion of the 286,000 acres of State of New Mexico lands within the confines of the White Sands Missile Range. Accordingly, this

association has a vital interest in seeking review of the lower court's decision, which if left undisturbed would result in a precedent denying a state grazing lessee just compensation for a compensable property right in derogation of the protection afforded under the Fifth Amendment.

STATEMENT OF THE CASE

The United States brought this action by way of condemnation. The property involved consists of two tracts of land designated in the record as tracts 304 and 305, which tracts are owned by the State of Arizona, having been acquired as part of the grant by the United States under the New Mexico-Arizona Enabling Act (Act of June 20, 1910, 36 Stat. 557, as amended June 2, 1951, 65 Stat. 50). The lands were granted for the support of public schools and are subject to the restrictions set forth in Sec. 28 of the Act. At the time the condemnation suit was filed, the lands involved had been leased by the State of Arizona (Arizona) to the Petitioner, Alamo Land and Cattle Co., Inc. (Alamo), under a ten-year grazing lease.

Subsequent to the filing of the condemnation, Arizona and Alamo stipulated with the United States that full just compensation for the property and improvements thereon was the sum of $118,620.00. Following a distribution hearing, the District Court awarded Alamo the sum of $3,600.00 for its improvements and $57,050.00 for its present leasehold interest and awarded Arizona the balance of the award.

On appeal by Arizona to the Ninth Circuit, the judgment awarding compensation to Alamo for its present leasehold interest was reversed and all the compensation, excepting that relating to improvements, was ordered paid to Arizona.

REASONS FOR GRANTING THE WRIT

The decision below raises issues of great and far-reaching importance. In this brief, we show that the lower court's holding with respect to the right of a state grazing lessee to be compensated for the value of his present leasehold interest is in direct conflict with the decision of the Eighth Circuit in **Nebraska v. United States,** 164 F.2d 866 (8th Cir. 1947); furthermore, the decision decides an important state question in a way to conflict with applicable state law. In addition, we will show that the lower court's holding involves an important question of federal law which has not been, but should be, settled by this Court. For these reasons, we believe that if the decision of the Ninth Circuit is left undisturbed, it will result in the perpetration of the claimed error causing owners of state grazing leases to be subjected to loss of their property without just compensation in violation of the protection afforded under the Fifth Amendment.

A. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE EIGHTH CIRCUIT.

The Ninth Circuit's decision on the question at issue squarely conflicts with the decision of the Eighth Circuit in **Nebraska v. United States, supra.**

In **Nebraska**, the Eighth Circuit was concerned with a condemnation suit instituted by the United States to acquire some 19,500 acres of land in Nebraska which included two sections of land which had been granted to the State of Nebraska under its Enabling Act for the support of common schools, 13 Stat. 47, 49, Sec. 7. At the time of condemnation, these lands had been leased by the State to private persons for agricultural use for unexpired terms of years. The trial court jury found that a portion of the award was due the lessee and entered judgment accordingly. On appeal to the Eighth Circuit, the State of Nebraska maintained a contention identical to Respondent herein:

> "(T)he State contends that the United States should have been required to pay it as just compensation an amount equal to the full value of the fee without any deduction for the outstanding leaseholds" 164 F.2d at 867.

The Eighth Circuit, in rejecting the contention of the State of Nebraska, affirmed the lower court's award and in so holding stated:

> "What constitutes property and what is just compensation for it in a condemnation by the United States are not questions of state law but of federal law. **United States v. Miller**, 317 U.S. 369, 379, 380, 63 S.Ct. 276, 283, 87 L.Ed. 336, 147 A.L.R. 55. Of course, the term 'property' in such a situation normally will be given the same content as in state law. **United States v. Powelson**, 319 U.S. 266, 279, 63 S.Ct. 1047, 1054, 87 L.Ed. 1390; and also cf. **United States v. Petty Motor Co.**, 327 U.S. 372, 380, 381, 66 S.Ct. 596, 601, 90 L.Ed. 729." 164 F.2d at 867, 868.

Elaborating further on the fact that a lessee had a compensable property right, the Eighth Circuit stated:

> "In state concept as well as under general law, the rights of the State and the rights of lessees in the school lands each constituted a property interest, and in this concurrence of concepts there manifestly would be no occasion to regard either of them otherwise in federal law for purposes of compensation in condemnation. But, as we have suggested, the question of what is just compensation under the Fifth Amendment for such rights does not turn in any manner upon the compensation standards or prescriptions of state law. If it did, the State of Nebraska in the present situation would have had as much right to argue that the United States should be bound by some artificial provision in its Constitution (e.g. that in any condemnation of its school lands the State should be paid a value of $1,000.00 per acre) as by the rule of compensation which it has judicially adopted for such lands in the **Platte Valley Public Power & Irrigation District** case." 164 F.2d at 868.

Finally, the Eighth Circuit, addressing itself to the contention of the State of Nebraska that to

sanction the compensation award to the lessee would result in a breach of trust under the Enabling Act, said:

> "In relation to the sovereign rights and constitutional obligation of the United States, the school lands therefore could not be said to be in any different position as to value and just compensation than the other lands in the community.
>
> The compensation obligation of the United States was not increased by the fact that the State held the lands for the benefit of its common school system. The United States in originally granting the lands to the State had not guaranteed that the State would realize any amount out of them for the benefit of its schools. It did not agree that, should condemnation of such lands subsequently become necessary for its sovereign purposes, it would pay more than the fair market value of the land in compensation. It did not assume to save the State harmless in such a situation from a diminution in the market value of the State's rights through the creation of a leasehold, easement, or other interest in the land by the State's own acts.
>
> As a matter of fact, except only as the State has undertaken to condition the exercise of its grant of the power of eminent domain over school lands, it has expressly recognized that it cannot expect to escape the pecuniary consequences of creating leaseholds in such lands." 164 F.2d at 869.

The Ninth Circuit in the case at bar, while recognizing the pronouncements in **Nebraska**, determined that the case at bar was distinguishable because the Nebraska Enabling Act did not contain the same restrictions which are incorporated in Section 28 of the New Mexico-Arizona Enabling Act as construed and interpreted by this Court in **Lassen v. Arizona**, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515. **Lassen** is clearly not authority for the proposition that the Arizona Enabling Act precludes a lessee of school lands from receiving just compensation for a leasehold estate taken by way of condemnation. **Lassen** did not involve a federal condemnation and can only be said to stand for the proposition that the Arizona Highway Department must pay just and reasonable compensation to the State Land Commissioner when condemning school trust fund lands. 87 S.Ct. at 586. Although the opinion in question refers to a difference in the wording between the Enabling Acts of Arizona and Nebraska, it fails to recognize that portion of Nebraska's Enabling Act which refers to school trust lands (2 N.R.S. 1943, p.7) was construed exactly the same in **Nebraska v. United States, supra,** as Arizona's was construed in **Lassen.** The court below in construing **Lassen** to require that all consideration be paid to the State cited with approval the following statement of this Court:

> "(T)he Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given." 385 U.S. at 467.

The lower court in relying on the above quotation construed the statement to mean that even in situations where the fee is encumbered by a permitted lease that the State must nevertheless receive the full value of the fee interest. Such a construction was obviously not intended by this Court in this instance because the condemnation of the separate estates did not effect a "transfer". The only "transfer" of the land occurred when the State created the leasehold estate as expressly authorized by the Enabling Act, and no question is involved concerning whether the State received full value for the lease at the time of the leasehold transaction. As the trial court held, when the condemnation was filed, there were two separate and distinct estates in land and each was entitled to compensation for the estate taken. The only requirement of both Enabling Acts is that the State receive full value for the "property interest" owned by the State at the time of condemnation. To construe the Enabling Act restrictions otherwise is contrary to the plain and unequivocable dictate of the Fifth Amendment securing only the right to just compensation for the property interest actually taken. This principle is even more clear under the Arizona Enabling Act than the Nebraska Enabling Act because the Arizona Act expressly permits the Commissioner of Public Lands to execute grazing and agricultural leases for a term of ten years or less (Sec. 28). (This is equally true under the New Mexico Enabling Act.) The principle of federal condemnation law requiring allocation of the total value between the separate interests or estates in the land is not unique and has been repeatedly sanctioned by the

courts. **Nebraska v. United States, supra, Boston Chamber of Commerce v. City of Boston,** 217 U.S. 189, 30 S.Ct. 459, 54 L.Ed. 725, and **United States v. Certain Parcels of Land in City of Baltimore,** (D.C. Md.) 43 F.Supp. 687, 689.

B. THE DECISION BELOW DECIDES AN IMPORTANT STATE QUESTION IN CONFLICT WITH APPLICABLE STATE LAW.

Not only have the federal courts abided the rule requiring compensation to separate estates and interests upon condemnation, the courts of Arizona and New Mexico have likewise adopted such rule.

Thus, in **State ex rel. State Highway Commission v. Chavez,** 80 N.M. 394, 456 P.2d 868 (1969), the New Mexico Supreme Court in upholding the right of a state lessee to receive compensation for the leasehold estate taken by the New Mexico State Highway Department in condemnation, stated:

> "From the testimony of appellant's appraiser, quoted above, it is clear that the lease, even though it had less than six months to run, and did not have a legally binding option to renew, was in his opinion a valuable asset worth $22,500.00 before the taking, which was reduced to $6,000.00 after taking, or a net damage to the lessee of $16,500.00. We see nothing in our earlier holding that denied the right to have all the elements of damage resulting from the condemnation con-

sidered when arriving at the award. Indeed, such a holding would be of questionable constitutionality as permitting the taking or damaging of property without the payment of just compensation." 456 P.2d at 873.

Likewise, the Arizona Supreme Court in **State v. Carrow**, 57 Ariz. 429, 114 P.2d 891 (1941) has recognized that a lessee is entitled to a condemnation award based upon its interest in the property:

> "It is necessary, therefore, that the judgment be reversed and the case remanded for a new trial upon the issue of damages for erosion, diversion of drainage, and loss of use as a cattle range, with instructions to apportion the damages for these elements between the owners of the fee and of the leasehold of the land damaged as their respective interests may appear." 114 P.2d at 893.

C. THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The importance of this litigation insofar as it concerns the right of a state grazing lessee to recover compensation when such estate is subject to condemnation cannot be overstated. In the state of New Mexico alone there are in excess of 9,000,000 acres of school lands subject to grazing leases. (Annual Report of Commissioner of Public Lands, State of New

Mexico, 61st Fiscal Year, July 1, 1972 through June 30, 1973). The import of the Decision is not limited solely to the right of a grazing lessee to receive compensation, but rather the statement of the lower court that "Alamo therefore never acquired a property right for which it is entitled to compensation" has far reaching economic implications which we understand will be commented on at length in other amicus briefs in support of the Petition. Furthermore, state grazing leases are involved in practically all ranches of any consequence in both the states of Arizona and New Mexico due to the manner in which lands were granted to the states under the Enabling Acts. It is a matter of common knowledge that in appraising these ranches for sale, condemnation and estate tax purposes, the state leases have since statehood been generally considered and recognized by both the states and the owners of these ranch properties as valuable "property rights". In this connection, the decision of the lower court fails to point out and to consider the fact that the Arizona Enabling Act, which is also the case of the New Mexico Enabling Act, makes specific provision for the leasing of state lands for agricultural purposes. Certainly when the states undertook to exercise the privileges given to them of leasing the lands for agricultural purposes and to receive from the lessees compensation therefor, the state lands should be considered as burdened with the rights granted to the respective lessees under the leases, which are certainly a property right as much as any other lease regardless of the character of the land which it may cover.

Finally, the decision of the lower court casts a serious cloud over the validity of collateral assignments of such leases as security for loans, a procedure sanctioned by the Land Commissioners in both Arizona and New Mexico (see, for example, Section 7-8-39, N.M.S.A., 1953 Compilation). If it can be said that such collateral is not supported by a property right, then obviously the collateral is of little or no value to lending institutions who daily secure loans by such means. In addition, other agencies of the federal government have historically considered such leaseholds property interests. For example, the Bureau of Internal Revenue, Estate Tax Division, routinely imposes tax on estates where such state leaseholds are involved.

It is only by this Court accepting jurisdiction and overturning the lower court that the disasterous consequences of the decision below can be rectified. Anything short of this request would mean that the guarantee of the Fifth Amendment requiring compensation to all property interests and estates would be abrogated. **United States v. Dunnington**, 146 U.S. 338, 351, 352, 353, 13 S.Ct. 79, 36 L.Ed. 996; **Meadows v. United States**, (4th Cir.) 144 F.2d 751, 753; and **United States v. Sunset Cemetery Co.**, (7th Cir.) 132 F.2d 163, 165.

CONCLUSION

The decision of the court below conflicts with the decision of the Eighth Circuit in **Nebraska v. United States, supra,** and contravenes

established federal and state condemnation law and procedures. It is essential that this conflict be resolved to insure persons in the status of grazing lessees on state school trust lands have their property interest protected as is required by the Fifth Amendment. The issue involved is one of substantial legal and practical importance and should be decided by this Court.

Respectfully submitted,
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By _____
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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the within Brief Amicus Curiae to counsel for Petitioner and Respondent.

_____

DATED: August 8, 1974

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No._____

ALAMO LAND & CATTLE CO., INC., Petitioner.

-vs-

STATE OF ARIZONA, Respondent.

We hereby consent, pursuant to Rule 42 of the Supreme Court Rules, that the above Amicus Curiae Brief of the White Sands Ranchers Association may be filed in this proceeding with the Supreme Court of the United States.

DATED this 2nd day of August, 1974.

S/J. GORDON COOK, for and on behalf of ALAMO LAND & CATTLE CO., INC., Petitioner

S/PETER C. GULATTO, Assistant Attorney General for and on behalf of The State of Arizona, Respondent

Supreme Court, U. S.
FILED
AUG 15 1974
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-125

ALAMO LAND & CATTLE CO., INC.,
Petitioner,
VERSUS
STATE OF ARIZONA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION OF ALAMO LAND & CATTLE CO., INC.

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In the

SUPREME COURT OF THE UNITED STATES
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The Federal Land Bank of Wichita and the Albuquerque, Clovis, Las Cruces, Roswell, and Springer Production Credit Associations as "federally chartered instrumentalities of the United States" operate under the provisions of the Farm Credit Act of 1971, Act of December 10, 1971, 85 Stat. 583, 12 U.S.C. § 2001 et. seq., in extending agricultural credit to farmers and ranchers in New Mexico. The Federal Intermediate Credit Bank of Wichita, also a federally chartered instrumentality of the United States and operating under the provisions of the Farm Credit Act of 1971, makes loans to these Production Credit Associations and may participate with them in making loans to farmers and ranchers. The Federal

Land Bank and the Albuquerque, Clovis, Las Cruces, Roswell and Springer Production Credit Associations have existing loans in the amount of $168,546,220.41 in the State of New Mexico. A substantial amount of which involves collateral assignments of state lease land.

Therefore, these instrumentalities have a great financial interest in seeking review of the lower court's decision, which, if not reviewed, sets a precedent that a lessee holds no compensable property interest.

STATEMENT OF THE CASE

This was a condemnation action commenced by the United States. The lands involved, designated in the record as tracts 304 and 305, are part of the grant to the State of Arizona by the United States under the New Mexico - Arizona Enabling Act (Act of June 20, 1910, 36 U.S. Stat. 557, as amended June 2, 1951, 65 Stat. 50). The lands, granted to Arizona for the support of public schools, are subject to the restrictions contained in § 28 of the Act. Alamo held the tracts under a ten year grazing lease at the time of the condemnation.

After the filing of the action, Arizona and Alamo stipulated with the United States that full compensation for the two tracts and the improvements thereon amounted to $118,620. After the distribution hearing, the District Court awarded Alamo $57,050 for its present leasehold interest as well as its reasonably prospective future leasehold interest and $3,600 for its

improvements. The balance was awarded to Arizona. On appeal to the Ninth Circuit, Alamo was awarded only the value of its improvements and the rest of the compensation was to be paid to Arizona.

REASONS FOR GRANTING THE WRIT

The Enabling Acts under which both New Mexico and Arizona were admitted to the Union are substantially the same. Other than the provisions regarding the length of the term of leases, the sections concerning the grant of public lands to be held in trust by the states are basically identical. 364 U. S. Stat. 557, §§ 10 and 28. Thus, the decision below that Arizona had no power to grant a compensable property right to Alamo and that Alamo, therefore, never acquired a property right for which it was entitled to compensation could have a far reaching effect in New Mexico as well as Arizona.

A. THE DECISION BELOW HAS FAR REACHING ECONOMIC IMPLICATIONS.

Whether or not a lessee has a property right in the leasehold could alter the future of agricultural lending in the State of New Mexico by the Farm Credit instrumentalities making loans in that state.

The Production Credit Associations, in making short term agricultural loans, make credit decisions based on credit factors which include the borrower's

financial statement showing state leases. The Production Credit Associations also obtain assignments of state leases as collateral. As of July 31, 1974, the Production Credit Associations held state lease land as collateral in connection with loans outstanding in the amount of $10,915,995.67. A holding that the lessee's interest in a state lease is not an interest in real property will eliminate a stable source of collateral and dilute the financial statements of farmers and ranchers; thereby, reducing the amount of short term agricultural credit available to them.

The Federal Land Bank, with the approval of the Farm Credit Administration, its regulatory agency, has made long term agricultural real estate loans in New Mexico in which state lease land has formed part of the security since the mid-1930's. State lease land, when offered as security with the base land, has been held not only to be "an interest in real estate" as required by the Farm Credit Act of 1971, Act of December 10, 1971, 85 Stat. 583, 12 U.S.C. § 2017, but also to have a supportive market value.

As of July 31, 1974, the Federal Land Bank of Wichita had an unmatured principal balance of $91,772,645.18 in loans outstanding in New Mexico. While exact figures are not available as to the percentage of this amount attributable to real estate mortgages secured in part by state lease land, it is substantial. $6,905,700.00 of that amount alone was loaned between January 1, 1973, and August 5, 1974, to farmers and ranchers whose security for these mortgages included state lease land.

The state leases enhance the market value of the base property; thus, the value of the entire operation is enhanced and a larger loan can be obtained by the rancher. However, if the lease were determined not to be "an interest in real estate" both the actual value of the lease and its enhancement value could not be considered in the appraisal; therefore, the market value of the entire operation would be lowered as would be the mortgage which the unit could support.

B. THE DECISION BELOW THAT A LEASEHOLD IS NOT A COMPENSABLE INTEREST IN REAL PROPERTY CONFLICTS WITH THIS COURT'S HOLDINGS AND WITH BASIC PROPERTY LAW.

That a lease is an interest in real property is not a new concept. In *United States v. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311, the Court defined the term property by stating that "it deals with what lawyers term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years." A leasehold interest, therefore, is an interest in real property. This principle was followed in decisions by the Supreme Courts of both New Mexico and Arizona. *Tri-Bullion Corp. v. American Smelting and Refining Co.*, 58 N. M. 787, 277 P.2d 293 (1954); *Yrisarri v. Wallis*, 76 N. M. 776, 418 P.2d 852 (1966); *Harbel Oil Company v. Steele*, 83 Ariz. 181, 318 P.2d

359 (1957). That this interest in property is an interest entitled to compensation has been commented on in another amicus brief in support of the opinion.

If the opinion below stands, its impact will be strongly felt by farmers and ranchers because of its impact on the agricultural lending institutions in New Mexico. Although the decision will not be binding on the Supreme Court of New Mexico, it will be highly persuasive. This persuasion would greatly reduce the stability of lending on ranches which are dependent on state lease land as an integral part of their operation. The uncertainty resulting from this decision may also affect lending on state leases in all the Western States.

If the opinion below stands, the Production Credit Associations would be severely hampered in their ability to provide short term agricultural loans. If the opinion below stands, New Mexico borrowers of the Federal Land Bank of Wichita would, also, be deprived of a source of credit to which they would otherwise be entitled by the Farm Credit Act of 1971.

If the state grazing leases retain the status given them in the court below, they will not be encompassed in the term "an interest in real estate". Under the Farm Credit Act of 1971, a Federal Land Bank loan must be secured by a first mortgage on interests in real estate. A Federal Land Bank loan cannot be predicated upon an interest in real estate which has been so diluted as to be nil.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

ALAMO LAND AND CATTLE CO., INC.

Petitioner

vs. NO. 74-125

THE STATE OF ARIZONA,

Respondent

BRIEF FOR THE STATE OF NEW MEXICO AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1974

ALAMO LAND AND CATTLE CO., INC.

Petitioner

vs. NO._____

THE STATE OF ARIZONA,

Respondent

BRIEF FOR THE STATE OF NEW MEXICO AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE STATE OF NEW MEXICO

The State of New Mexico owns in excess of nine million (9,000,000) acres of land which have been leased to ranchers for grazing purposes for successive five (5) year terms from statehood in 1912 to the present time. These leases are executed on behalf of the State by the Commissioner of Public Lands who is the constitutional agent operating under the Enabling Act, the Constitution, and New Mexico Statutes. See Article XIII, New Mexico Constitution.

If the decision of the Ninth Circuit is left undisturbed, it will nullify numerous New Mexico legislative enactments upon which ranchers

and financial institutions engaged in making farm and ranch loans have relied in their business dealings for over sixty (60) years.

Under the above circumstances, failure by the State of New Mexico to speak out at this time would constitute a breach of faith toward that segment of the economy of the State. For this and other reasons hereinafter set forth, the Honorable Bruce King, Governor of the State of New Mexico, and Alex J. Armijo, its Land Commissioner, have requested that this brief be filed on behalf of the State of New Mexico by its Attorney General pursuant to Paragraph 4 of Supreme Court Rule 42.

STATEMENT OF THE CASE

The United States brought this action by way of condemnation. The property involved consists of two tracts of land designated in the record as tracts 304 and 305, which tracts are owned by the State of Arizona, having been acquired as part of the grant by the United States under the New Mexico-Arizona Enabling Act (Act of June 20, 1910, 36 U.S. Stat. 557, as amended June 2, 1951, 65 Stat. 50). The lands were granted for the support of public schools and are subject to the restrictions set forth in Sec. 28 of the Act. At the time the condemnation suit was filed, the lands involved had been leased by the State of Arizona (Arizona) to the Petitioner, Alamo Land and Cattle Co., Inc. (Alamo), under a ten year grazing lease.

Subsequent to the filing of the condemnation, Arizona and Alamo stipulated with the

United States that full just compensation for the property and improvements thereon was the sum of $118,620.00. Following a distribution hearing, the District Court awarded Alamo the sum of $3,600.00 for its improvements and $57,050.00 for its present leasehold interest and awarded Arizona the balance of the award.

On appeal by Arizona to the Ninth Circuit, the judgment awarding compensation to Alamo for its present leasehold interest was reversed and all the compensation, excepting that relating to improvements, was ordered paid to Arizona.

REASONS FOR GRANTING THE WRIT

New Mexico and Arizona are sister states having been admitted under the same Enabling Legislation. In this connection, Section 10 of the New Mexico Enabling Act (Act of June 20, 1910, 36 Stats. at Large 557, Chapter 310) provides:

> "....No mortgage or other encumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of a county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time,

and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: **Provided, That nothing therein contained shall prevent said proposed state from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.** (Emphasis Supplied).

The Arizona Enabling Act differs only that it provides for a ten (10) year lease.

Since statehood in 1912, the New Mexico legislature has interpreted this section to mean that the State can and does give a lessee a vested leasehold estate for the term of his lease which could cover a period from 1 to 5 years being at the discretion of the Commissioner of Public Lands. This interpretation is in line with the case of **Nebraska v. U.S.**, 164 F2d 866 (1947).

In this connection, attention is directed to the following statutes:

7-8-31, N.M.S.A., 1953 Compilation, originally being Section 14 of the Laws of New Mexico 1912, authorizes the Commissioner of Public Lands to issue leases for periods not to exceed five (5) years.

7-8-37, N.M.S.A., 1953 Compilation, originally being Section 1, Chapter 130, Laws of New Mexico 1935, prohibits the Commissioner of Public Lands from cancelling such leases before the expiration of the full stated term, except for specific breaches.

7-8-39 thru 7-8-45, N.M.S.A., 1953 Compilation, originally being Chapter 126, Laws of New Mexico 1933, sets up a procedure for a lessee to pledge his improvements and leasehold interest as security for a loan.

In **American Mortgage Company v. White,** 34 N.M. 602, 387 Pac. 702, the New Mexico Supreme Court held that such arrangement did not violate the prohibition against encumbrances set out in Section 10 of the Enabling Act hereinabove. Also, the New Mexico Supreme Court in **State ex rel. State Highway Commission v. Chavez,** 80 N.M. 394, 456 P2d 868, held that a lessee's interest in a five year or less lease had a value even though the renewal was entirely at the discretion of the Commissioner of Public Lands.

It is submitted that this long standing legislative and court interpretation in New Mexico, as it relates to Section 10 of its Enabling Act

and which follows the **Nebraska v. U.S. supra,** is the correct one, and that neither **Lassen v. Arizona State Highway Department,** 385 U.S. 458, 87 SCt. 584, 17 L.Ed. 515, nor **State ex rel. State Highway Department v. Walker,** 61 N.M. 301 P2d 317, modify the Nebraska or New Mexico decisions. The Lassen and Walker cases hold that the State Highway Departments of the respective States must compensate the trust for rights of way over and across and for sand and gravel removed from trust lands. They have no relationship to the case at bar.

The ruling of **Nebraska v. U.S.** should be applied to the comparable ten year lease provision in the Arizona Enabling Act. It is recognized, however, that the result of the Arizona decision herein might well be the same for the reason that Arizona's ten year lease is actually only a license which can be terminated upon thirty (30) day notice by the State of Arizona in case the State Land Board wishes to reclassify the lands (Grazing Rule 31 and Lease Form A-11, Paragraph P). However, as the case may be, the Ninth Circuit decision based on an Enabling Act consideration is not what Congress intended and such a ruling if not modified will effectively nullify the sixty (60) year old policy in New Mexico which was designed to give a limited tenure as an inducement to conservation and preservation of grazing lands. The decision could also result in recall and loss of loans with further disasterous effects in New Mexico. Therefore, the decision of the Ninth Circuit cannot and should not stand upon Enabling Act considerations.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-125

ALAMO LAND & CATTLE CO., INC.,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE OF RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

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ALAMO LAND & CATTLE CO., INC.,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONSE OF RESPONDENT

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Respondent, STATE OF ARIZONA, by and through the Attorney General of Arizona, prays that the writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, entered on March 28, 1974, be denied by this Court.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 495 F.2d 12 (1974). This decision was filed with the Court by petitioner as Appendix A to its petition. The decision of the Court below was filed March 28, 1974. Thereafter a motion for a rehearing was denied by the Court below on May 17, 1974.

The jurisdiction of this Court

could be properly invoked under 28 USC § 1254(1) 1966, which permits the United States Supreme Court to issue a writ of certiorari to the United States Court of Appeals. However, respondent submits that there has not been sufficient or good reason shown in the petition to justify this Court's accepting jurisdiction of the issues through issuance of a writ of certiorari.

STATEMENT

On May 31, 1966, the United States filed a notice of condemnation in the United States District Court, District of Arizona, and the Court entered an order of delivery of possession. Among the parcels included in the designation of taking were those designated as Tracts 304 and 305 which are part of the grant

to the State of Arizona by the United States under Section 24 of the New Mexico-Arizona Enabling Act. (Act of June 20, 1910, 36 U.S. Stat. 557, 568-579, Vol. 1, Arizona Revised Statutes, pp. 79-93). The lands were granted for support of the common schools and are subject to the specific restrictions of Section 28 of said Enabling Act.

On February 8, 1962, the land was leased by the respondent to the petitioner under a 10-year grazing lease. At the time of the taking, the land was being used for grazing purposes by the lessee.

On September 13, 1971, and February 11, 1972, respectively, the State of Arizona (Respondent herein, hereinafter referred to as "Arizona") and Alamo

separately stipulated with the United States of America, that full and just compensation for the taking of the property, together with all improvements thereon and appurtenances thereunto belonging, was the sum of $48,220 for Tract 304 and the sum of $70,400 for Tract 305, or a total of $118,600 (rounded) for said tracts, including improvements.

On March 3, 1972, a distribution hearing was held before the Honorable Walter E. Craig, United States District Court Judge. The only parties appearing and claiming an interest in the award were Arizona, claiming title through the above referenced Enabling Act grants, and Alamo, claiming a compensable leasehold interest in the land as well as a compensable interest in the value of the

improvements. Arizona conceded that as lessee Alamo is entitled to receive the value of the improvements, but contested the lessee's right to participate in the award for land value.

After the hearing and consideration of legal memoranda submitted by the parties the District Court entered an opinion and judgment awarding the State of Arizona the sum of $57,970 for its fee interest in the subject property and awarding Alamo the sums of $3,600 for its improvements and $57,049 for its lease-hold interest and reasonably prospective leasehold interest.

The State of Arizona appealed the opinion and judgment to the United States Court of Appeals for the Ninth Circuit, which by the opinion of the Court set

forth in 495 F.2d 12 (1974), reversed awarding the entire value of the land taken, $115,020, to the State of Arizona and $3,600 to lessee for the improvements concluding that Alamo had no compensable interest in the state school trust land.

REASONS FOR DENYING THE WRIT

1. The decision below which determined that petitioner does not have a compensable interest in state school trust property taken in condemnation does not conflict with the condemnation principle as evidenced in A.W. Duckett & Co. v. United States, 266 U.S. 149, 45 S.Ct. 38, 69 L.Ed. 216 (1924), for the reason that in condemnation proceedings a lessee is entitled to compensation for damage to his leasehold only if he can demonstrate that he has a compensable

interest in the property being condemned. Lessees of Arizona school trust lands do not receive a compensable interest in state land for the reason that the Enabling Act, as interpreted by Lassen v. Arizona, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967), states:

> The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given. First, it requires that before trust lands or their products are offered for sale they must be "appraised at their true value" and that "no sale or other disposal . . . shall be made for a consideration less than the value so ascertained. . . ."

87 S.Ct. at 588-589. (Emphasis supplied.)

Respondent submits that under the authority of the guidelines set forth

in the Lassen decision, federal condemnation procedures or direct sales to the federal government are a proper vehicle for the sale of state trust lands so long as the state is provided full compensation for the lands which assure the integrity of the trust.

A direct sale to the federal government is authorized under the Lassen case and under Arizona Revised Statutes (hereinafter cited as A.R.S.) § 37-232 which provides in part as follows:

> A person desiring to purchase state lands, or the lessee of any leased school or university land entitled to reimbursement for improvements thereon, may make a verified written application to the state land department.

Under this circumstance the sale would take place upon completion of an appraisal and a determination that the interest

of the state would not be prejudiced thereby, which under threat of condemnation would be at best highly unlikely. (A.R.S. § 37-236). In the event the land is sold, the lessee has no right to receive <u>any</u> portion of the sale price of the land, but is only entitled to receive the appraised value of the improvements which were placed on the property with the approval of the State Land Commissioner (A.R.S. § 37-242.A). Under this procedure the school trust account receives the full appraised value of the land being sold for public purposes. Had the federal government made application to purchase the land, the purchase price which the trust would have realized is $115,020. Any transaction, condemnation or otherwise, which

results in a lesser amount being deposited to the school trust account results in a sale or other disposal of lands from the trust at less than the true appraised value and is expressly prohibited by Section 28 of the Enabling Act and the Lassen case.

The only way the trust may be compensated for the full appraised value of the land would be for this Court to conclude, as the Ninth Circuit Court of Appeals concluded, that the lessee has no compensable interest in the trust property.

2. The decision below in determining that petitioner is not entitled to any compensation for its leasehold interest upon condemnation by the United States of America for another public

purpose does not conflict with Nebraska v. U. S., 164 F.2d 866 (8 Cir. 1947), cert. den., 334 U.S. 815 (1948).

Respondent concedes that this case which concluded that Nebraska school lands must be treated as any other private property and just compensation for such lands taken by condemnation must be allocated or apportioned between the state and a lessee on the bases of their relative values. The case was determined nearly 20 years prior to the Lassen case. Of particular interest is that the Nebraska case can be readily distinguished from the present because the Nebraska Enabling Act contains none of the restrictions on sale or disposal of school trust lands that are contained in Section 28 of the New Mexico-

Arizona Enabling Act.

Section 7 of the Nebraska Enabling Act, U. S. Stat. at Large, Vol. 13, p.47, provides as follows:

> And be it further enacted, That sections number sixteen and thirty-six in every township, and when such sections have been sold or otherwise disposed of by any Act of Congress, other land equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be, shall be and are hereby, granted to said state for the support of the common schools.

There are no other restrictions imposed on the sale or disposal of Nebraska school trust lands. With a lack of any congressionally imposed restrictions relating to the sale or disposal of the lands, the 8th Circuit Court's decision in Nebraska v. U.S., supra, appears to be correct and consistent with the Lassen case. The

decision as it affects Nebraska school land, in light of the congressionally imposed trust restriction on Arizona's school trust lands, and the Lassen decision, cannot have any application to disposal of Arizona school trust lands.

It is particularly interesting to note that while the Nebraska Enabling Act, supra, does not contain any specific trust restrictions on disposal or sale of the school property, a trust was nevertheless implied in the case of U.S. v. 7861 Acres of Land, 265 F.Supp. 564 (D. Neb. 1967), by applying the Lassen decision to the Nebraska school lands, by requiring the Bureau of Reclamation to pay for rights of way over Nebraska's school lands.

The trend of cases regarding the

restricted use of school trust lands appears to be moving toward strict enforcement of trust requirements. The instant case should not be an exception. The Nebraska case, supra, may be distinquished from the instant case without comment by this Court, and is not justification for granting writ of certiorari.

3. Even if the decision below concludes that the State must receive its full appraised value of the land by taking petitioner's suggestions that the state's lessee would not be precluded from receiving an amount that the leasehold has enhanced the value of the property beyond what it would have been otherwise had there been no lease. This contention, if not directly at least indirectly, was rejected in U.S. v. Fuller,

93 S.Ct. 801 (1973), wherein it was concluded that on the taking the grazing land which had an enhanced value as a result of actual or potential use in combination with Taylor Grazing "permit", the Fifth Amendment requires any compensation for any value added to fee lands by the permits which were revocable but by the Act's terms created no property rights.

Respondent suggests somehow that in a condemnation action involving a total take there are more elements in an award for damages than the value of the land and the value of the improvements. The case of State of Texas v. Harris County Houston Ship, C.N. Dist., 158 F.2d 861 (5 Cir. 1946) demonstrates this is an incorrect appraisal conclus-

ion. Therein the Court stated:

> . . . [i]t must be remembered that while, as between the condemner and the condemnee, the property is valued as a whole, as between the owners, the distributive portion of the whole value is to be determined as to each other obtaining when the taking occurs.
>
> 158 F.2d at 865.

This argument is not giving grounds for granting the writ of certiorari.

4. Petitioner argues that the fact that many citizens may be affected by the decision below for justification for this Court's accepting jursidiction through certiorari and also that if lessees are not entitled to compensation they will lose present financing. Since this Court in the Lassen case, supra, stated in unequivocal terms that the school trust must receive the full ap-

praised value of the lands taken out of the trust, respondent submits that the decision of the Court of Appeals is only a logical extension of the Lassen case and is not cause for panic by lessees. Admittedly, the decision will affect all school lands held in trust by the State Land Department and probably all school lands held in trust by the State of New Mexico. The effect of the decision, however, cannot be so broadly construed to include all trust lands granted to the various states by the federal government. The apparent reason for this is that each of the trust grants are subject to varying trust restrictions as has been demonstrated by distinguishing the Arizona trust from the Nebraska trust. By

its decision in the Lassen case, this Court has already determined the nature of the trust. The court below by rendering its decision is merely implementing the Lassen decision. No further review or comment is necessary from this Court. Petitioner suggests that the decision will affect the lessees'ability to mortgage their leasehold interest in state lands. Of course, under the specific terms of Section 28 of the Enabling Act no lien, mortgage or other encumbrance is valid against the respondent's interest in the land. However, the lessee's ability to mortgage the improvements on his land cannot be impaired by the decision for the reason that Section 28 of the Enabling Act

specifically recognizes the right of a lessee to have his value of improvements secured. Therefore the mortgage of any improvements is secure by reason that the lessee will be reimbursed for their value upon a subsequent sale of the property. On the other hand, if lending institutions are overextending credit to the lessees of school trust properties based on their "value" of the leasehold, the decision does not affect their security interest any more before the decision than it would afterwards. Any time the respondent determines that it is in the best interest of the trust to sell the property and does so by direct sale to a public agency or otherwise, the security interest is lost. The fact that lending institutions have overextended credit to lessees of state school trust

properties is not justification for depleting the trust in order to protect a secured interest which is at best questionable. The petitioner has failed to state grounds upon which the writ of certiorari should be granted.

CONCLUSION

Since this Court handed down its decision in Lassen v. Arizona, supra, the State of Arizona has made a concerted effort to bring about implementation of that decision. While the decision resolved the question of whether or not the trust must be compensated for state lands taken therefrom, it nevertheless created many questions specifically relating to condemnation procedures which must ultimately be resolved by a court of competent appellate jurisdic-

tion. The issue of whether or not a lessee has a compensable interest in state property is but one of the questions which must ultimately be resolved as a result of the Lassen case. Respondent submits that the decision rendered by the Ninth Circuit Court of Appeals is correct and accurately implements the dictates of this Court. There is no further reason or justification for this Court to make any further declarations concerning the nature of the Arizona school trust lands. It is therefore respectfully submitted that the decision of the United States Court of Appeals for the Ninth Circuit should stand and that the petition for writ of certiorari should be denied.

Respectfully submitted,

N. WARNER LEE
The Attorney General of
Arizona

CERTIFICATION

N. WARNER LEE, being fully admitted to practice before the Supreme Court of the United States, hereby certifies that three copies of the Response have been deposited in the United States mail, postage prepaid, addressed to:

Richard Alleman
U. S. Attorney's Office
Federal Courthouse
Phoenix, Arizona

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1000 Luhrs Building
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Attorney for Petitioner

this 6th day of September, 1974.

N. WARNER LEE
The Attorney General
of Arizona

Supreme Court, U. S.
FILED
JUN 14 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-125

ALAMO LAND & CATTLE CO., INC., Petitioner,

v.

STATE OF ARIZONA, Respondent.

OPENING BRIEF OF PETITIONER

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IN THE

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OCTOBER TERM, 1974

No. 74-125

ALAMO LAND & CATTLE CO., INC., Petitioner,

v.

STATE OF ARIZONA, Respondent.

OPENING BRIEF OF PETITIONER

OPINIONS BELOW

The favorable to Petitioner Opinion and Judgment of the District Court, dated May 5, 1972, (R.[1] 224-228) will appear in the Single Appendix, which by stipulation has been deferred. The unfavorable to Petitioner Opinion of the United States Court of Appeals, Ninth Circuit, appears in the Appendix to Petitioner's Petition for Writ of Certiorari.

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1. R. means Record

JURISDICTION

Jurisdiction of The United States Supreme Court is envoked under 28 *U.S.C.* § 1254(1). The Petition for Writ of Certiorari is timely because it was docketed in The Supreme Court on August 15, 1974, which, pursuant to Rule 36 of *The Federal Rules of Appellate Procedure*, as contemplated by 28 *U.S.C.* § 2101, was within ninety days from May 17, 1974, the date of denial by the Court of Appeals of Petitioner's Petition for Rehearing to that court.

CONSTITUTIONAL PROVISIONS, STATUTES AND ACTS INVOLVED

These are all contained in the Appendix that is a part of this brief and are *U.S.C. Constitution Amendment* 5; § 28 of the *New Mexico-Arizona Enabling Act*, such being found at 36 *U.S. Stat.* 557, 568-579 (1910) and in 1 *A.R.S.*[2] at 79-98; *A.R.S.* § 37-231A, § 37-242, § 37-284, § 37-288, § 37-290, § 37-291, § 37-293 and § 41-511.06 (effective 1957).

QUESTIONS PRESENTED FOR REVIEW

1. Do the *New Mexico-Arizona Enabling Act* provisions concerning school trust land granted to Arizona that specifically permit leasing of said land but generally provide that no sale or other disposal of the land shall be for less than its full appraised value but say nothing about condemnation or who shall receive said proceeds upon condemnation,

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2. *A.R.S.* means *Arizona Revised Statutes*

require, upon condemnation by the United States of America of the leased land, assuming the value of the land has not been enhanced because of the leasehold,[3] that Arizona receive the full value of said land and its tenant receive only the value of its improvements?

2. Even if Question Presented No. 1 is answered negatively to lessee-Petitioner, does the *New Mexico-Arizona Enabling Act* preclude the lessee from receiving that part of the land condemnation monies that represent the enhancement of the value of the land because of the leasehold under circumstances wherein Respondent Arizona receives more than the full value of the land as it would be valued without the leasehold, to-wit: Petitioner's use of the property in conjunction with other property owned or operated by Petitioner?

STATEMENT OF THE CASE

The United States of America condemned two sections of land owned by the State of Arizona in trust pursuant to § 28 of the *New Mexico-Arizona Enabling Act*, which section is set forth in the Appendix hereto. At the time of the condemnation,

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3. There was credible evidence below that such enhancement exceeded Respondent's award. This question is presented with this contrary assumption to better analyze the law and the principal case relied upon by Respondent. A negative answer means Petitioner prevails. An affirmative answer necessitates consideration of Question Presented No. 2, which then considers whether Petitioner's award was justified because it represented only a part of the enhancement in value of the land because of Petitioner's use of the property.

as said *Act's* sections specifically allow, a lease was in existence between Respondent Arizona and Petitioner. At such condemnation time, these two sections were part of Petitioner's operating cattle ranch that contained 1,064.9 acres of fee lands, condemned in a separate proceeding,[4] but without consideration of Petitioner's 43,403.97 acres of federal domain held under *Taylor Grazing Act* permits issued in accordance with 43 *U.S.C.* § 315*B*.[5] The location of these various different types of land classifications is described on Exhibit A (D. Ex. A; T.[6] 15, 22) the fee land being outlined in blue, State Lease lands in orange, and the Taylor Grazing Permit land outlined in red.

The United States tendered to the Federal Registry the sum of $48,220.00 for one of the State Lease sections and $70,400.00 for the other, or a total of $118,620.00. Petitioner and Respondent agreed this amount was reasonable. The dispute at issue results from a distribution hearing before the District Court wherein Petitioner was awarded $3,600.00 for its improvements, $57,050.00 for its current and reasonably prospective leasehold interest, and Respondent was awarded $57,970.00.

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4. United States of America v. 1,071.08 Acres of Land, more or less, situate in Yuma and Mohave Counties, State of Arizona, et al, No. CIV. 69-101 Phoenix WEC, In the United States District Court for the District of Arizona.

5. *United States* v. *Fuller*, 409 U.S. 488, 93 S. Ct. 801, 35 L. Ed. 2d 16 (1973), held that the 5th *Amendment* created no property rights that would permit Petitioner to receive compensation for any value added to the fee lands by said permits.

6. T. means Reporter's Transcript of proceedings.

See Opinion and Judgment of The District Court (R. 224-228), to be contained in the Single Appendix. The United States Court of Appeals reversed, saying Petitioner was only entitled to receive $3,600.00 for its improvements, and Arizona the balance, *United States v. 2,562.92 Acres, Yuma & Mohave Co., Ariz.*, 495 F.2d 12 (9th Cir. 1974).[7]

At the distribution hearing, Petitioner proved, as found by the District Court, that:

> ". . . the true value of the premises would be reflected in the use of the premises in connection with other properties owned or controlled by Alamo [Petitioner] as a cattle ranch; that the property would otherwise be relatively, of no value."
> (R. 224-228)

Consequently, Petitioner contended that pursuant to established federal law condemnation principles, it was entitled to receive, in addition to the value of its improvements, either the difference between the fair market value of the property and the value of the lessor's interest or the amount of the enhancement of the value of the property solely because of its leasehold, to-wit: the difference between the value of the property with the leasehold and what it would have been without the leasehold.

Petitioner's cattle farm[8] and ranch,[9] including the State Lease sections at issue, was isolated, the nearest paved highway, but for a road relating

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7. See Appendix to Petitioner's Petition for Writ of Certiorari.

8. Referring to irrigated pasture.

9. Referring to desert grazing.

to the condemnation, being 30 miles away. (T. 28-32) Two blue marks on Exhibit C (D. Ex. C; T. 28, 33) a map, show that State Lease sections. (T. 35) There was no contradiction at the hearing of Petitioner's appraiser's unequivocal statement that the two lease sections considered by themselves and not in connection with Petitioner's cattle operation would have a fair market value of $40,000.00 to $50,000.00. (T. 39, 88)

One of these sections did have a spring utilized for cattle watering which greatly contributed to the value of Petitioner's cattle operation as a whole because it was between and tied in Petitioner's irrigated pasture lands by the river, the heart of the property, with the sparsely grazed Taylor Grazing land. (T. 14, 16, 18, 20, 21, 92, 93) The other State Lease section had two wells, one operable and one not. (T. 20, 21)

Petitioner's above fee land was along the Bill Williams River. (T. 14; D. Ex. A; T. 15, 22) Of this, at a time a few months before the taking below of May 21, 1966 (T. 13, 14), approximately one-half of Petitioner's fee land along a river was developed or was being developed to irrigated farm land for pasture forage for use in connection with said State Lease and Taylor Grazing lands. (T. 14, 17) The two State Lease sections at issue are high land with roll and not irrigable. (T. 95, 96) At said time, 192 acres of said fee land had already been developed for ditch gravity irrigation, 43.2 acres for sprinkler irrigation, and 280 acres were being developed to gravity ditch irrigation. (T. 17)

The appraisal of The United States of America was received in evidence. (D. Ex. D; T. 85, 95) It contained a statement:

> "Consequently, the market value of these river bed lands is inseparable

from their usefulness in connection with the dry grazing areas on both sides of the river, which desert areas are useful only when water, livestock control, and dependable forage can be relied upon." (T. 86)[10]

The riverbed lands were Petitioner's fee lands while the desert areas included the State Lease lands. Petitioner's appraiser explained this above-quoted statement meant that the appraiser for The United States of America:

". . . gave consideration to the fact that the state lease land is a part of an operating unit and has value because it serves as a part of that unit with the dependable irrigated forage . . ." (T. 87)[10]

It was firmly established policy that renewals of State grazing leases would preferentially and customarily be granted[11] until there was a change in use to a higher land value such as residential, commercial, industrial or agricultural. (T. 23, 26, 27, 103, 104, 116, 119; D. Ex. D; T. 85, 95) Said appraisal of the United States (D. Ex. D; T. 85, 95) considered and recognized such policy. It provided:

"Tenure has been stable even when

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10. The District Court expressly adopted this reasoning and testimony as shown by the above quotations from his opinion and order, page 5 hereof.

11. Such is Arizona statutory and case law. § 37-291 *Arizona Revised Statutes, 1956; Ehle v. Tenny Trading Co.*, 56 Ariz. 241, 107 P.2d 210, 212.

> the lessees have cancellation clauses and termination dates. Preference for renewal has been both officially sanctioned and practiced as a custom." (T. 87)

As above, the State Lease property was only suitable for grazing purposes. The purpose of this testimony was to provide the basis for estimating how long Petitioner would have been in possession of the property as lessee had the condemnation not occurred,[12] which, as above shown, was at least until a higher use was available. Petitioner's appraiser, based on the properties' remote location and Arizona population trends, thought 36 years. (T. 30-35) The District Court thought 26 years. (R. 224-228)

In recognition of the senior interest of the State, Petitioner's appraiser determined the present value of the right of the State of Arizona to receive the property back at the end of the lease term, plus the anticipated renewal, plus the value of the right to receive the rents specified in the lease for the term of the lease and its expected renewal, and attributed to Petitioner as lessee the difference between these two sums and the monies paid for just compensation by the United States, less the value

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12. The Arizona Supreme Court held that such right of renewal "is a valuable, substantial right" and said that not "to recognize equities in those who have built up a ranching business . . . would be injurious if not destructive to that industry." *Ehle v. Tenny Trading Co.*, 56 Ariz. 241, 107 P.2d 210, 212. The New Mexico Supreme Court held that a state lessee was entitled to compensation for the leasehold interest, including "a renewal that could reasonably be anticipated." *State ex rel. State Highway Comm'n v. Chavez*, 80 N.M. 394, 456 P.2d 868, 872 (1969).

of Petitioner's improvements. (T. 38) This is a well-recognized and documented appraisal technique. (T. 45) After gentle prodding by the Court, and after consultation with Respondent's appraiser, Respondent's attorney stipulated to the qualifications of Petitioner's appraiser. (T. 13) Based on an expected lease term of 26 years, including renewals, the present worth of the right of Arizona to receive the rents for 26 years and of the reversion, or Arizona's right to receive the property back at the end of the lease period, was the rounded off sum of $57,970.00. (T. 97) The value of Petitioner's interest was the improvements or $3,600.00, plus the difference between the condemnation monies less improvements and the State's said interest, or $57,049.52, or a total of $60,650.00. (T. 97) The District Court adopted this testimony awarding Arizona $57,970.00 and Petitioner $60,649.00 (R. 224-228)

ARGUMENT

I. About Question Presented No. 1:

This argument supposes, contrary to substantial testimony before the District Court, that the property at issue had *no* enhancement in value by being a part of a working cattle farm and ranch. This assumption permits a direct analysis of *Lassen v. Arizona Highway Dep't*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967) without deciding whether such case is satisfied by the testimony about enhancement. If Petitioner loses on this question, then it turns to Question Presented No. 2 for the effect of the enhancement testimony.

The opinion of the United States Court of Appeals attempted to avoid the 5th *Amendment*, which it recognized would ordinarily require Petitioner to receive just compensation for its leasehold

interest by saying, "However, under the Enabling Act, Arizona, as trustee, had no power to grant a compensable property right to Alamo [Petitioner]". 495 F.2d at 14. Laconically, the reasoning was that Arizona held the lands as trustee and the trust would be violated if it received less than the full value of the fee and to hold otherwise would be in contravention of *Lassen v. Arizona Highway Dep't*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967). Although *Lassen* specifically stated that "the Enabling Act unequivocably demands both that the trust receive the full value of any land transferred from it and that any funds received be employed only for the purpose for which the land was given" [87 S. Ct. 588], *Lassen* did not consider condemnation rights of a state lessee. *Lessen* determined that upon condemnation of these trust lands by Arizona, Arizona must pay full value to the school trust. Neither *Lassen* nor any other decision of this Court has determined that upon condemnation the lessee is not entitled to just compensation for its leasehold interest. The question then becomes whether an *Enabling Act* [Arizona's] which provides that when the school trust lands are offered for sale they must be "appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained . . ." [§ 28 of said *Act*] and also provides for leasing the property, but which is silent about condemnation, means that upon condemnation the lessee receives nothing for its leasehold interest and such is not violative of the 5th *Amendment*.[13] While said provision just quoted requires condemnation by the state of trust fund lands, because literally applied it requires that upon disposition of the land, an appraised true value be paid, the provision does not say who the funds shall be

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13. Herein leasehold interest is distinguished from the value of improvements which was $3,600.00.

paid to. It does not say only to Arizona. It does not say, even if it applies to condemnation, if true value means of Arizona's lessor's interest without any consideration of enhancement in value of the property because of its use in conjunction with other properties owned or operated by Arizona's tenant.

Contrary to the reasoning of the Opinion of the United States Court of Appeals, § 28 of the *New Mexico-Arizona Enabling Act* specifically permits leasing, saying in part "nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing . . . purposes . . .". The Arizona Legislature, without qualification as to whether the land leased by the State was trust land or otherwise, said that Arizona, "in seeking to establish a state park or monument on state . . . owned land . . . shall not request the termination or cancellation of any valid lease . . . unless adequate compensation is awarded to the holder of such lease . . ." and further "in any event the holder of such lease . . . shall receive fair and adequate compensation for the cost of and damage to his property interest or loss of his lease . . ." and that "in determining the amount of such compensation, consideration shall be given to any preferential rights of renewal and other preferential rights of the owner or holder thereof, the damage to the remaining land . . . and damage to the rights and option which such owner may have and of other relative factors." *A.R.S. § 41-511.06*, Added Arizona Session Laws 1957, Ch. 99, § 1. This is recognition of the preferred right to renewal expressed by the Arizona Legislature in *A.R.S. § 37-291*, 1956, and interpreted by the Arizona Supreme Court as "a valuable, substantial right" in *Ehle v. Tenny Trading Co.*, 56 Ariz. 241, 107 P.2d 210, 212.[14]

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14. The lease recognizes all this for it provides

As stated by New Mexico in *State ex rel. State Highway Comm'n* v. *Chavez*, 80 N.M. 394, 456 P.2d 868, 873, to not allow such compensation for the leasehold interest "would be of questionable constitutionality as permitting the taking or damage of property without the payment of just compensation." 456 P.2d at 873. Perhaps this is why § 28 of the *Enabling Act* did not provide what happens upon condemnation.

United States v. *Fuller*, 409 U.S. 488, 93 S. Ct. 801, 35 L. Ed. 2d 16 (1973), mentioned in Footnote 5, aids Petitioner and supports said reasoning in *State ex rel. State Highway Comm'n* v. *Chavez*, 80 N.M. 394, 456 P.2d 868. The basis of its holding "that the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondents' fee lands in combination with the Government's permit lands" was that "The provisions of the Taylor Grazing Act quoted ante make clear the congressional intent that no compensable property might be created in the permit lands themselves as a result of the issuance of the permit.". 93 S. Ct. 801, at 805. Nothing in *Lassen* v. *Arizona Highway Dep't*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967), nor in the *Enabling Act* makes clear a congressional intent that Arizona's lessee shall not have a compensable property right in the leased lands and to the contrary, the above *A.R.S.* § 41-511.06, refers to the lessee's interest as a "property interest".

Statements in the Opinion of the United States Court of Appeals below that "However, under the

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that it "is issued subject to all the provisions and requirements thereto, which are found in the various Acts of the Legislature of the State of Arizona, the same as though they were fully set forth herein." Section (1) (D. Ex. B; T. 22, 23)

Enabling Act, Arizona, as trustee, had no power to grant a compensable property right to Alamo", and that "Alamo therefore never acquired a property right to which it is entitled to compensation" (495 F.2d at 14) are in opposition to said Arizona statute (*A.R.S.* § 41-511.06) and the following reasoning of the United States Court of Appeals in *Nebraska v. United States*, 164 F.2d 866 (8th Cir. 1947), *cert. denied*, 334 U.S. 315 (1948):

> "It [the Nebraska Enabling Act] did not agree that, should condemnation of such land subsequently become necessary for its sovereign purposes, it would pay more than the fair market value of the land in compensation. It did not assume to save the State harmless in such a situation from a diminution in the market value of the State's rights through the creation of a leasehold, easement, or other interest in the land by the State's own acts.
>
> "As a matter of fact, except only as the State has undertaken to condition the exercise of its grant of the power of eminent domain over school lands, it has expressly recognized that it cannot expect to escape the pecuniary consequences of creating leaseholds in such lands." 164 F.2d at 869.

Nebraska v. United States, as just quoted, saying that *Nebraska's Enabling Act* "did not assume to save the state harmless" in condemnation "from a diminution of the market value of the state's rights through the creation of a leasehold . . ." is recognition that the *Nebraska Enabling Act* could have so provided by in essence setting forth the same thing as a condemnation clause in a lease wherein it is said that upon the taking by eminent

domain of the whole or a part of the premises leased the term shall come to an end and the lessee shall receive nothing upon condemnation [see 4 *Nichols on Eminent Domain*, § 12.42(1) at 12-488, 489]. Neither the *Nebraska* nor the *New Mexico-Arizona Enabling Act* so provide. Consequently, the *Fifth Amendment* does require compensation for Petitioner's leasehold interest. This is to say that since denial of the state lessee's right to receive just compensation for his leasehold interest is to work a forfeiture, such denial will not be implied, but only effected when no other result is possible. 2 *Nichols on Eminent Domain*, § 5.23(2) at 5-94, wherein it is stated:

> "It has been held that the law does not look with favor on clauses causing forfeiture of the lessee's interest on condemnation, hence, a lease covenant will be construed not to have that effect if its language and the circumstances possibly permit."

Logic and common sense explain why there is no provision in the lease or *Enabling Act* that terminates the lease without compensation to the lessee upon eminent domain proceedings. This is that such termination, as the State of New Mexico stated in its Amicus Curiae Brief, could "result in recall and loss of loans with further disasterous effects in New Mexico." (Page 6 thereof.) This is precisely what was said in the Amicus Curiae Brief in Support of The Petition for Writ of Certiorari (one brief) by The Federal Land Bank of Wichita and The Federal Intermediate Credit Bank of Wichita and many listed Production Credit Associations. The very isolation of the leased land herein shows that if the Opinion of the Court of Appeals below is correct, the school trust fund stands to lose much leasing revenue because what other leasing use does the property have except for grazing purposes, and who could afford to lease the property except

large[15] ranchers? The very fact of the amicus curiae briefs establishes that these thoughts are real and not frivilous.

Footnotes 2 and 3 of *Lassen v. Arizona Highway Dep't*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967), show that the grants by the United States of school trust lands was four sections in each township. They further establish that the total national acreage of lands given in support of common schools is 78,000,000 acres, and Arizona's 8,000,000 acres. Appendix C to Petitioner's Petition for Writ of Certiorari, Bureau of Land Management Tables, shows the distribution between the states of such properties. The total in Arizona and New Mexico is almost 17,000,000 acres., See Appendix C to Petitioner's Petition for Writ of Certiorari, page 10 of Amicus Curiae Brief in Support of Petition for Writ of Certiorari by White Sands Ranchers Association and page 1 of Brief of State of New Mexico in Support of Petition for Writ of Certiorari. By the very nature of the relatively limited population and desert and mountainous terrain of New Mexico and Arizona, the overwhelming majority of these lands are isolated and leaseable only for grazing purposes. The State of the Case herein shows that the situation that existed below is typical. Then, to deny upon condemnation a compensable right to lessee is to prevent considerable revenue to the State and severly interfere with the cattle industry. This explains why New Mexico in its Amicus Curaie Brief takes a more farsighted and realistic view, than Arizona's.

If the Court adopts Petitioner's position that

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15. "Large" is used because obviously grazing cattle just on the state lease sections would not be an economically feasible operation. In showing this Respondent did not realize it supported Petitioner's enhancement theory. (T. 72-74)

the *Enabling Act* does not prevent it from receiving just compensation for its leasehold interest, it then becomes necessary to consider whether the lease did. The opinion below of the Court of Appeals said:

> "1. The lease specifically provided that:
>
> a. It was made subject to the laws of Arizona.
>
> b. In the event the State relinquished the property to the United States, then the lease shall be null and void as it may pertain to the land so relinquished.
>
> c. No provision of the lease shall create any vested right in the lessee.
>
> "2. Sections 37-242 and 37-293 of the Arizona Revised Statutes restrict a lessee's participation in the proceeds of a sale of public land to the value of improvements.
>
> "We do not find it necessary, however, to determine the rights of Alamo based upon these lease provisions or the state law." 495 F.2d 12 at 14.

Arizona did not relinquish any land to the federal government. The complete vesting provision said:

> "The terms, conditions and covenants of this lease are subject to present laws relating to state lands and the rights of both lessor and lessee hereunder are each and all subject to such modifications

> as may be consistent with such amendments, revisions or repeals of existing laws as may hereafter be made and no provision of this lease shall create any vested right in the lessee herein." (D. Ex. D; T. 85, 95)

The prohibition against vesting simply means there are contingencies that can terminate the lease, not that Petitioner has no condemnation rights in the leasehold. See *Snortum* v. *Snortum*, 155 Minn. 230, 193 N.W. 304, 305, which recognized that the well-understood meaning of the word "vested" was that the estate involved is no longer subject to any contingency. There is even a contingency in the preferential right of renewal, because it is not absolute. See *A.R.S.* § 37-284. *A.R.S.* § 37-288 permits forfeiture and § 37-290 permits cancellation of the lease if the lands are reclassified to a higher use, although the lessee does have a preferred right to re-lease. Although the section proceeding the last portion of the lease just quoted specifically provides that the lease could be terminated upon reclassification of the property and *A.R.S.* § 37-231*A et seq.* permits sale of the leased property, upon reclassification the lessee has a preferred right to lease the reclassified land, *A.R.S.* § 37-290, and upon sale a successful bidder other than the lessee must pay the lessee the value of its improvements. *A.R.S.* § 37-242, 1956, and § 37-293, 1956.

All this establishes that neither the *Enabling Act* nor the lease nor Arizona Statutes or law prohibits Petitioner receiving what the District Court awarded. The *Fifth Amendment* demands it.

The method utilized by Petitioner's appraiser giving paramount consideration to Respondent's lessor's interest by first valuing its present value and attributing the difference between such and what the condemnor paid is similar to the position

of the United States of America contained in the following wording from its Amicus Curiae Brief in support of granting Certiorari:

> "Our position here is in harmony with that reading of Lassen: the State, acting in its capacity as trustee, must receive the full value (fair rental value as of the beginning of the lease term) of the possessory interest transferred by lease, and upon condemnation also must receive the full value of its reversionary interest. But it is not additionally entitled to receive the compensable value of the leasehold interest. Cf. State of Nebraska v. United States, 164 F.2d 866 (C.A. 8), certiorari denied, 334 U.S. 815."

This appraisal technique utilized by such appraiser[16] is supported both by recognized appraising authorities as shown by the Statement of the Case and by appellate decisions: *Edmund Realty Co. v. Walmer Bldg. Co.*, 123 F.2d 54 (8th Cir. 1941); *Baltimore v. Latrobe*, 101 Md. 621, 61 A. 203, 4 Am. Ann. Cas. 1005 (1905); *Chicago, etc. R.R. v. Chicago Mechanics' Institute*, 239 Ill. 197, 87 N.E. 933 (1909); *City of Chicago v. Lord*, 276 Ill. 544, 115 N.E. 8 (1916); *City of Cincinnati v. Smythe*, 57 Ohio App. 70, 11 N.E.2d 274, 275 (1937).

This is consistent with basic Arizona law that requires apportionment of damages between the owners of the fee and of the leasehold as their respective interests may appear. *State v. Carrow*,

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16. Determining the present value of the lessor's rights to receive rents and the reversion and allocating to the lessee the difference between this and the monies paid.

57 Ariz. 429, 114 P.2d 891, wherein the court said:

> "It is necessary, therefore, that the judgment be reversed and the case remanded for a new trial upon the issue of damages for erosion, diversion of drainage, and loss of use as a cattle range, with instructions to apportion the damages for these elements between the owners of the fee and of the leasehold of the land damaged as their respective interests may appear." 114 P.2d at 893.

Speculation in the Amicus Curiae Brief of the United States about any disparity between lease-rentals and fair market value cannot be considered by this Court because no evidence about this was presented below. *Ramsey* v. *United Mine Workers of America*, 401 U.S. 302, 91 S. Ct. 658, 28 L. Ed. 2d 64, *on remand*, 344 F. Supp. 1029, *appeal after remand*, 481 F.2d 742, *cert. denied*, 414 U.S. 1067, 94 S. Ct. 576, 38 L. Ed. 2d 473, discussion under syllabus 4, 91 S. Ct. 658 at 664, 665.

The appraisal of the United States by considering the State Lease property useful only as a part of Petitioner's cattle operation because of Petitioner's dependable forage on the land it owned and Petitioner's preferential renewal necessarily recognized Petitioner's leasehold interest. By denying such, Respondent seeks a windfall. This leads to the argument about Question Presented No. 2.

II. About Question Presented No. 2:

Argument here becomes necessary only if the Court decides that *Lassen* v. *Arizona Highway Dep't*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967), and/or the *New Mexico-Arizona Enabling Act* requires that Arizona receive no less than

the full value of the property, regardless of the *Act* permitting leasing and not containing any language prohibiting upon condemnation the lessee receiving the value of its property interest. This argument considers the effect of the enhancement in value testimony. The conclusion in *Lassen* that "the Enabling Act unequivocally demands * * * that the trust receive the full value of any lands transferred from it" (87 S. Ct. 588) is specifically based upon provisions of the *Act* referring to the sale of the land at public auction. The third paragraph of § 28 of the *Act* restricts sale at a public auction to the highest and best bidder. The next paragraph, quoted in *Lassen*, before the sale, requires the lands to be "appraised at their true value." 87 S. Ct. at 588. The following paragraph, also quoted from in *Lassen*, still referring to such public auction sale mentioned two paragraphs above, then provides that "no sale or other disposal * * * shall be made for a consideration less than the value so ascertained * * *". 87 S. Ct. at 588, 589. Consideration of how the property would be appraised at such a sale sheds light upon what is meant by full value. Unless the purchaser were Petitioner, the purchaser would not have the right to utilize the property in conjunction with Petitioner's cattle business. Consequently, the property would be appraised without regard to any enhancement in value because of its use by Petitioner in conjunction with the lands owned and operated by Petitioner.

The very isolation of the property, its being surrounded by properties operated by Petitioner, and the inability of anyone to economically use the land, except petitioner, support the observation of the District Court quoted on page 5 hereof that the property would be relatively of no value unless its value is reflected in its use in connection with other properties owned or controlled by Petitioner. This true value or enhancement in value because of such use was recognized in the appraisal of the United States of America. Surely the *Fifth Amendment* and

common sense require that such full value referred to in *Lassen*, if, in spite of Petitioner's argument in Question Presented No. 1, it applies to condemnation, only applies to the extent of determining the full value of the trust lands as such would exist without consideration of any enhancement in value thereof because of the lessee's said use.

The consideration by the United States of America of the enhancement of the market value of the property because it was being used by Petitioner in combination with other lands used by or belonging to Petitioner is in accord with recognized condemnation law. *4 Nichols on Eminent Domain § 12.314, pages 12-216*, 217, states:

> "Thus, where the adaptability for a specific use depends upon the land being used in combination with lands belonging to other persons, such use may be shown if the possibility of such combinations is so great as to have a definite effect in enhancing the market value of the property."

United States Supreme Court's decisions cited in the footnote in support of this statement are *Olsen* v. *United States*, 292 U.S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 (1934); *McCandless* v. *United States*, 298 U.S. 342, 56 S. Ct. 764, 80 L. Ed. 1205 (1936); *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 63 S. Ct. 1047, 87 L. Ed. 1390 (1943); *United States* v. *Fuller*,[17] 409 U.S. 488, 93 S. Ct 801, 35

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17. The subject land there is adjacent to Petitioner's. If the decision below stands, Petitioner and those similarly situated will lose, upon condemnation, not only any enhancement of the value of their fee lands because of their Taylor Grazing permits, but the value of their leasehold interest in school trust lands leased from a state.

L. Ed. 2d 16 (1973). Because condemnation does "seek the value of 'the fee as a whole'" the law does permit "proof of the enhancing value of the lease." *4 Nichols on Eminent Domain*, § 12.36(1), page 12-435. The evidence below establishes that the enhancement of the market value of the property at issue because of Petitioner's use and operation of it in connection with other properties owned or controlled by Petitioner, was that such enhancement was greater than Petitioner received. This is so because the full value of the lands at issue, without consideration of such enchancement and use was $40,000.00 to $50,000.00, yet Arizona received $57,970.00. Such was simply "proof of the enhancing value of the lease". *4 Nichols on Eminent Domain*, § 12.36(1), page 12-435.

Even though the method of appraising the property as if it were not leased[18] to determine the value of the lessor's interest is unique, condemnation law permits a practical remedy in an unusual case, *United States* v. *Priest Rapids Irr. Dis't*, 175 F.2d 524 (9th Cir. 1949), wherein the court said:

> "As we have indicated above, the procedure which applied the Schwellenbach formula appears to have been born of necessity due entirely to the awkward posture of the case, but it also clearly appears that in applying it the lower court was appraising realities and utilizing a practical remedy which, in its end result, insured payment of just compensation for any property taken in this case. If applying the formula did not result in denying just compensation for property here taken, it is not open to attack on purely technical grounds.

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18. The $40,000.00 to $50,000.00 testimony.

We would sacrifice substance to form if we reached any other conclusion." 175 F.2d 524 at 531.

Cf. Richland Irr. Dis't v. United States, 222 F.2d 112 (9th Cir. 1955), and *United States v. Citrus Valley Farms, Inc.*, 350 F.2d 683 (9th Cir. 1965). In the latter case, the District Court applied common sense in instructing the jury in a then first-ever condemnation-valuation problem, which was readily upheld, which allowed the jury, if it so found, to deduct the value of a so called right to arrive at just compensation for the landowner.

CONCLUSION

Petitioner requests that the Court reverse the decision of the United States Court of Appeals below and affirm the decision below of the United States District Court, either because the *Enabling Act* applied to pertinent law, regardless of any enhancement of the property by the lessee's use in connection with other properties operated or controlled by lessee, permits the lessee upon condemnation to receive the value of its leasehold interest (Question Presented No. 1), or because in any event, upon condemnation, the lessee is entitled to receive that part of the condemnation award that represents enhancement in value of the property in excess of what the value would have been but for the lessee's use of the property in connection with other property owned or controlled by the lessee (Question Presented No. 2).

Respectfully submitted,

J. Gordon Cook

CERTIFICATION

J. Gordon Cook, being duly admitted to parctice before the Supreme Court of the United States of America, herewith certifies that three copies of the Opening Brief have been delivered to the State of Arizona by depositing the same in the office of the attorney for the State of Arizona who appeared below in the District Court and the United States Court of Appeals for the Ninth Circuit, to-wit: Peter C. Gulatto, Assistant Attorney General, State of Arizona, State House, Phoenix, Arizona 85007.

Additionally, as a courtesy, I herewith certify that service of three copies of this Opening Brief has been made upon the United States of America by depositing the same in a United States mailbox, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

J. Gordon Cook

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APPENDIX A

CONSTITUTION

AMENDMENT V-CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Malitia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ENABLING ACT

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and

production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocabor substances on, in, or under lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be produced therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee. As amended June 5, 1936, c. 517, 49 Stat. 1477; June 2, 1951, c. 120, 65 Stat. 51.

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid. As amended June 5, 1936, c. 517, 49 Stat. 1477.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands,

or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, that said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act. As amended June 5, 1936, c. 517, 49 Stat. 1477.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder. Added June 5, 1936, c. 517, 49 Stat. 1477.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no land so reserved and excepted shall be subject to any disposition whatsoever of said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this

Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No money shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding. It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as many from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

APPENDIX B

ARIZONA REVISED STATUTES

§ 37-231. State Lands subject to sale; rights reserved in lands sold; state lands not subject to sale; development agreements

A. All state lands, except as otherwise provided for in this title, including all improvements made or placed thereon, or connected therewith, shall be subject to appraisal and sale as provided in this title.

§ 37-242. Payment by purchaser for improvements on land sold

A. When state lands on which there are improvements for which the owner thereof is entitled to be compensated are offered for sale, and the purchaser is not the owner of the improvements, the purchaser shall pay the person conducting the sale ten per cent of the appraised value of the improvements and the balance within thirty days thereafter. If the state land department determines that the amount at which the improvements are appraised is so great that competitive bidding for the land will be thereby hindered, the department may sell the improvements on installments payable ten per cent upon announcement of the successful bidder, fifteen per cent thirty days thereafter, and fifteen per cent annually thereafter for five years, together with six per cent interest on the balance remaining unpaid, which amount, until paid, shall be a lien upon the land. The purchaser shall at all times, keep the insurable improvements insured for the benefit of the state. Payments shall be made at the time

and in the manner prescribed for payments on the land, and any default in the payments for improvements shall be deemed a default in the payments for the land.

B. When improvements are sold on installments, the first twenty-five per cent, after deducting all rents, penalties and costs owing to the state on account of the land, shall be paid to the owner of the improvements, and the balance shall become a legal charge against the state.

C. Upon surrendering possession of any such land, the owner of the improvements thereof shall file with the commissioner of finance his claim for the balance on the improvements remaining unpaid, and if the claim bears the approval of the department as to correctness, and a certificate that possession of the lands and improvements has been surrendered by all persons having lawful claims for improvements on the land, it shall be paid by the state treasurer on the warrant of the commissioner of finance from any fund in which there is money subject to investment. As payments for the improvements are made by the purchaser, they shall be deposited with the state treasurer and both principal and interest shall be returned by him to the fund from which they were taken.

D. Failure to pay the balance of the purchase price or the fifteen per cent within thirty days after the announcement of the successful bidder shall constitute a forfeiture of all rights to the land and all payments made.

As amended Laws 1970, Ch. 190, § 51.

§ 37-284. Granting lease to one of several applicants; criteria; preference

A. If two or more applicants apply to lease the same land, the department shall approve the application of the one who, after investigation or hearing, appears to have the best right to the lease. The order of filing shall not be a controlling factor in deciding who is entitled to the lease. If it appears that none of the applicants has any right or equities superior to those of another, the department may, at a stated time and after due notice to all applicants, receive sealed bids submitted in accordance with rules and regulations of the department. The department shall approve the application of the bidder who in all respects is eligible to receive a lease upon the land and will pay the highest annual rental therefor, or the department may reject all bids.

B. Any person residing upon contiguous land for which he has an allowed United States homestead entry or for which he has received patent from the United States upon a homestead entry shall, upon application, have a preferred right to lease the amount of contiguous state land necessary for his personal use.

C. Any person lawfully occupying any lands, the title to which is acquired by the state by operation of law, shall have a preference right to lease the occupied land provided application so to do is made within thirty days from and after written notice by the state land department to such occupant of the acquisition of title.

As amended Laws 1961, Ch. 16, § 1.

§ 37-288. Forfeiture of leases; extension of payment

A. A lessee of state lands violating any condition of the lease shall forfeit the lease and his rights

thereunder. The state land department shall proceed to cancel the lease and take possession of the land or take such other steps as the interest of the state requires.

B. If the lessee fails to pay the rent when due, the department may extend the time for payment an additional period not to exceed ninety days. If an extension is granted, there shall be added to the rental a penalty of five per cent and interest on the delinquent rent and penalty at the rate of ten per cent per annum, until paid. The delinquent rent, penalty and interest shall be a lien on the improvements, crops, and property on the land. The department shall in no event extend the period for payment of rental more than three times and if the annual rental at any time is one calendar year in arrears, the lease shall automatically terminate and the department shall proceed to cancel it on the records of the department.

As amended Laws 1960, Ch. 82, § 2.

§ 37-290. Cancellation of lease by reclassification of lands; preferred right to lease reclassified land; refund of advance rental payments

A. Upon reclassification of state lands, whether upon application for reclassification or upon initiation by the commissioner, notice of the decision shall be served upon all interested parties of record in the department. If no appeal from the reclassification is taken as provided for by law, or if the decision of the commissioner is upheld on appeal, any lease upon the land reclassified shall be automatically cancelled, and the land offered for lease in the same manner as if it had not been previously leased.

B. A lessee, or an applicant for renewal of a lease at the time of the notice of the reclassification shall have a preferred right to lease the reclassified land at the reappraised rental thereof for a term not longer than ten years as determined by the department.

C. Upon cancellation of the lease of reclassified lands, if the land as reclassified is leased to a person other than the existing lessee or applicant for a renewal lease, the unused pro rata of an advance rental payment made by the existing lessee shall be refunded to such lessee, and the lessee shall be protected in improvements on the land owned by the lessee in the same manner as provided in § 37-293.

§ 37-291. Preferred rights to renewal of lease; exceptions

A. Upon application to the state land department not less than thirty nor more than sixty days prior to the expiration of a lease of state lands, the lessee, if he is a bona fide resident of the state, shall have a preferred right to renewal, bearing even date with the expiration of the old lease, for a term not longer than ten years, as determined by the department, at a reappraised rental.

B. The preferred right of renewal shall not extend to a lessee who has not substantially complied with the terms of his lease or who has not placed the land to the use prescribed in the lease during the term thereof or within the time prescribed therein, unless for good cause the failure to perform was given written authorization by the department. If the department determines the continued leasing of the land not in the best interest of the state, the lease shall not be renewed.

§ 37-293. Reimbursement by succeeding lessee for non-removable improvements; application for appraisal; notice; failure to pay; penalty

A. A lessee of state lands shall be reimbursed by a succeeding lessee for improvements placed on the lands which are not removable. If the retiring lessee and the new lessee do not agree upon the value of the improvements, either party may file with the state land department an application for appraisal of the improvements. Thereafter an appraisal of the improvements shall be made in the same manner and subject to the same conditions as appraisals of improvements are made when state lands are sold.

B. Upon making the appraisal, the department shall give notice of the amount thereof by registered mail to each person interested in the appraisal. The notice shall require that the new lessee pay to the department for the prior lessee the entire amount of the appraisal within thirty days from the date of the notice, or the department, when the value is greater than the rental for the period of the lease, may require that payment of ten per cent of the appraised value be made within thirty days, fifteen per cent within sixty days, twenty-five per cent at the end of the first year of the new lease, and twenty-five per cent at the end of each year thereafter until the entire balance is paid.

C. If the improvements are not paid for as required in the notice, the succeeding lessee shall not be permitted to sell, assign, or transfer his lease, nor sell, assign or remove any improvements whatever from the land until the entire amount of the appraised value of the improvements has been paid. Upon default he shall be subject to the same penalties and liabilities as provided by § 37-288 for failure to pay rents, including a cancellation of the lease.

§ 41-511.06. Eminent domain

A. In acquiring property by eminent domain, no water, watering facilities or water right of any person shall be taken separate and apart from the land served by such water, watering facilities or water rights, without fair and adequate compensation to be awarded for such land and water, watering facilities or water rights.

B. In seeking to establish a state park or monument on state or federally owned land, the board shall not request the termination or cancellation of any valid lease, permit, government land entry, mining claim, privilege or other right unless fair and adequate compensation is awarded to the holder of such lease, permit, privilege or other right. If the amount of the compensation cannot be determined by agreement, the board may proceed to cause such lease, permit, privilege, government land entry, mining claim or right to be terminated or cancelled if such can be lawfully done by the state or federal agency having jurisdiction thereof, or the board may proceed to acquire the same by eminent domain. In any event the holder of such lease, permit, privilege, government land entry, mining claim or right shall receive fair and adequate compensation for the cost of and damage to his property interest or loss of his lease, privilege, government land entry, mining claim or permit. In determining the amount of such compensation, consideration shall be given to any preferential rights of renewal and other preferential rights of the owner or holder thereof, the damage to the remaining land, damage by access roads, and damage to the rights and operation which such owner may have and all other relevant factors.

Added Laws 1957, Ch. 99, § 1.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-125

ALAMO LAND & CATTLE CO., INC.,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

BRIEF OF RESPONDENT

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-vs-

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On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

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PRELIMINARY STATEMENT

On May 31, 1966, the United States filed a Notice of Condemnation in the United States District Court of Arizona, and the Court entered an Order for Delivery of Possession. Among the parcels included in the declaration of taking were those designated as Tracts 304 and 305, more particularly described as follows:

TRACT 304

All of Section 2, Township 10 North, Range 13 West, Gila and Salt River Base and Meridian, in the County of Yuma, State of Arizona.

TRACT 305

All of Section 36, Township 11 North, Range 13 West, Gila and Salt River Base and Meridian, in the County of Yuma, State of Arizona.

The lands described above are part of the grant to the State of Arizona by the United States under Sec. 24 of the New Mexico-Arizona Enabling Act (Act June 20, 1910, 36 U.S. Stat. 557, 568-579, Vol. 1, Arizona Revised Statutes, pages 79-93). The lands were granted for the support of the common schools and are subject to the specific restrictions of Sec. 28

of said Enabling Act.

On February 8, 1962, the land was leased by the Arizona State Land Department to Alamo Land and Cattle Company, Inc., (hereinafter referred to as "Alamo"), under a ten year Grazing Lease. (Ex. B, R. 182-186). At the time of the taking the land was being used for grazing purposes by Lessee ("Alamo").

On September 13, 1971 and February 11, 1972, respectively, the Respondent herein, State of Arizona (hereinafter referred to as "Arizona"), and the Petitioner Alamo, separately stipulated with the United States of America that full just compensation for the taking of the property, together with all improvements thereon and appurtenances thereunto belonging, was the sum of $48,220.00 for Tract No. 304 and the sum of $70,400.00 for Tract No. 305, or a total of $118,600.00 (rounded) for said tracts, including improvements.

On March 3, 1972, a distribution hearing was held before the Honorable Walter E. Craig, Judge, United States District Court for Arizona. The

only parties appearing and claiming an interest in the award were Arizona, claiming title through the above referenced Enabling Act grants, and Alamo, claiming a compensable leasehold interest in the land as well as a compensable interest in the value of the improvements. Arizona conceded that a lessee is entitled to receive the value of the improvements, but contested a lessee's right to participate in the award for land value.

After the hearing and consideration of legal memoranda submitted by the parties, the District Court of Arizona entered an opinion and judgment awarding Arizona the sum of $57,970.00 for its fee interest in the subject property and awarding the Lessee Alamo the sum of $3,600 for its improvements and $57,049 for its leasehold interest and reasonably prospective leasehold interest.

The State of Arizona appealed the opinion and judgment to the United States Court of Appeals for the Ninth Circuit which issued its

opinion on March 28, 1974, reversing the decision of the District Court. A motion for rehearing by Alamo was denied May 17, 1974.

Alamo filed a timely Petition for Writ of Certiorari docketed with the Supreme Court on August 15, 1974, which petition was granted.

STATEMENT OF FACTS

The lands being acquired by the United States in this condemnation action described as Tracts 304 and 305 are part of the grant to the State of Arizona by the United States under Sec. 24 of the New Mexico-Arizona Enabling Act. The lands were granted for the support of the common schools and are subject to the specific restrictions and conditions contained in Sec. 28 of said Enabling Act.

On February 8, 1962, the land was leased by Arizona to Alamo under a ten-year grazing lease. (Ex. B., R. 182-187).

After the land was acquired by declaration of taking, Arizona and Alamo each independently

stipulated that the value of Tracts 304 and 305 amounted to the sum of $118,600. (R. 156). The question before the District Court at the distribution hearing was how the funds should be distributed between Arizona (owner/lessor) and Alamo (lessee). The position of Arizona was and is that, as a matter of law and fact, Arizona as owner of the school trust property must receive the full appraised value of the land in question as full just compensation for the taking and that the lessee is entitled to receive only the value of any improvements placed on the land. Alamo claimed a compensable interest in the land.

The only appraisal of the property before the court was that prepared by federal government appraiser Robert A. Rowe and is the appraisal, the same appraisal, on which the stipulations as to compensation were based. The appraisal report was admitted into evidence without objection. (T. 95). The Rowe appraisal appraised only the sections of state land. Alamo's private land and the cattle operation were not included as part of the "larger

parcel" for appraisal purposes nor were any of the federal permit lands included in the appraisal. The Rowe appraisal concluded the highest and best use of the land was agricultural and recreational purposes for the lower land area, and grazing for the higher, more barren land area. Contrary to the observation made by Alamo on page 8 of its Opening Brief, there is no evidence to rebut Rowe's conclusions regarding the highest and best use. Under lease provisions, however, the lessee was precluded from utilizing the land for other than grazing purposes. Mr. Rowe in his appraisal arrived at the following conclusions of value:

Tract 304 Estimated Value of Total Non-Federal Bundle of Rights is:

642,42 Acres at $75 = $48,219 (including all lessee's interests) = $48,220

Division of Lessee's Interest Market Value on Transfer:

Old Well	$100
1 Mile New Fence (3 yrs. old) (not on boundary)	$500
4-strand barbed wire with metal posts at 30' intervals; 3 wire stays between posts; (3 yrs. old)	
Leasehold bargain due to formula rental being below market (carrying capacity unit & percent of last years's cattle price)	$200

Total Lessee's Interest:		$ 800
Total Interest of the State:		$47,420
	($73.74 per acre)	

Tract 305 Estimated Value of Total Non-Federal Bundle of Rights is:

640 Acres at $110 per acre (including all lessee's interest)	$70,400

Division of Lessee's Interest Market Value on Transfer:

House, cookhouse, spring development, & pipe to house	$2,000
Fence (over 1 mi. 4-strand barbed wire with metal posts at 30' intervals; 3 stays btwn. posts	$ 500
Clearing-10 Acres at $50 per acre	$ 500
Bargain in leasehold resulting from less than market charge on formula rent (based on carrying capacity & percent adjusted for mkt. price of cattle per year)	$3,000
Total Lessee's Interest:	$ 6,000
Total Interest of the State:	$64,400

(Ex. D, p. 9)

The State's witness, Mr. William Fish, a review appraiser, concurred with the distribution set forth in the appraisal with one exception; he concluded that the Lessee is entitled only to the value of the improvements and the State is entitled to receive the full appraised value of the land. The Rowe appraisal allocation of $200 for Tract 304 and $6,000

for Tract 305 to Alamo for the bargain in the leasehold was thereby disputed. Mr. Fish's conclusion is supported by specific provisions of the lease which are quoted infra, and Sec. 28 of the New Mexico-Arizona Enabling Act.

Alamo presented a witness by the name of W. D. Davis. Mr. Davis did not appraise the property, but only gave testimony regarding distribution. Mr. Davis arrived at his distribution conclusion by projecting an anticipated renewal of the grazing lease for three additional ten-year periods, adding this to the 6 years left to run on the current lease. He then capitalized the State's income stream from rental receipts and concluded that the balance of the condemnation award should go to Alamo. Under Mr. Davis' theory Arizona was entitled to receive $44,220 and Alamo, as lessee, would be entitled to receive the balance of the award, or $70,296 for its leasehold tenancy and $3,600 for the improvements on the land in question. (T. 41-45).

That school trust lands are leased for grazing

purposes at a rate which does yield economic return when considering the market value of the land is undisputed. The subject leased land for grazing purposes has a carrying capacity of 8 animal units. (T. 72). The Lessee Alamo is precluded by specific lease provision, through statutory incorporation from using the land for any purpose other than grazing. (Ex. B, p. 1), Arizona Revised Statutes § 37-281.D.

On cross examination Mr. Davis indicated that appraisals and sales of ranches are commonly based on the per animal unit carrying capacity of the ranch. (T. 73). He testified concerning several sales of ranches involving State land, Bureau of Land Management land and fee land. (T. 67-73). The value that the animal unit carrying capacity on unirrigated State and Bureau of Land Management land contributed to the sale price of ranches ranged as follows:

Sale	Year	BLM & State Lease Land Value Per Animal Unit	
Linton/Knight	1966	$225	(T. 67)
Beck/Rudolph Chev.	1968	389	(T. 70)
Dodson/Ft. Rock Grazing Assn.	1967	400	(T. 71)
Ft. Rock Grazing Assn./_____	1970	514	(T. 71)
Miller/Pierce Farms	1968	703	(T. 71)

An examination of sales of ranches involving State lease lands shows State land contributes a maximum of $703 per animal unit carrying capacity. Applying this value to the subject property's carrying capacity of 8 animal units, the maximum market value of Lessee's grazing rights amounts to $5,624. (T. 73).

Further, on cross examination Mr. Davis was questioned concerning the application of the market value carrying capacity appraisal approach to his conclusions of the value of the leasehold, as follows:

> Q. In your direct testimony you indicated that the leasehold estate and the land itself was $70,296.38; is that correct?
>
> A. In utilizing the agreed upon settle-

ment with the United States as $118,620, then the value of the leasehold estate in my judgment is $74,400.

Q. Taking the figure that is based on the agreed upon price and the appraisal that was used to justify this stipulation, taking the $70,296.38 attributed to the land value of what you claim to be the lessor's interest, would you divide that amount by 8 animal units?

(Pause)

A. Divided by 8 animal units, this is $8,787.04 per animal unit.

Q. Are you aware of any sale of any property in Arizona which has the highest and best use of ranching operation that has sold for anywhere near $8700 an animal unit?

A. I have no knowledge of any sale that is even remotely close with full fee simple title of all interest and improvements and everything else for anything like that figure. (T. 73-74)

And Mr. Davis further testified:

Q. Isn't it true, Mr. Davis, that in the sale of ranches that the per unit carrying capacity of private ranches usually sell, where only private fee land is involved, usually sell for more than ranches where the major portion of the interest is state or federal?

A. They do, of course, on an animal unit basis sell for more on the deeded land portion than they do on the leased land portions.

Q. You have looked at this whole thing from a total standpoint of the ranch as the large parcel?

A. That is correct.

Q. Based on this concept, could you conceive that of a sale of the ranch based on $8700 per animal unit under the circumstances of the ranch?

A. I don't believe there would be any possibility of a sale at that rate of the ranch of any part of it.

(T. 83-84).

Upon request of Judge Craig a capitalized value of the Lessor-Lessee interest based on a probable lease extension of 26 years (the remainder of the existing lease plus two 10-year extensions), a 16 year probable lease period (remainder of lease plus one extension), and, at request of counsel, a probable lease period of 6 years (until the end of the present lease). The resultant testimony may be summarized as follows:

Lease Term	Lessor's Land Value	Lessee's Land Value	Value of Improvements
26 yrs.	$59,970	$57,049	$3,600
16 yrs.	75,325	43,300	3,600
6 yrs.	95,100	19,936	3,600

(T. 96-99)

The District Court rejected Arizona's argument that a lessee of school trust land under the lease and Sec. 28 of the New Mexico-Arizona Enabling Act has no compensable interest in the subject property. The Court's opinion and judgment was based on a probable anticipated lease period of 26 years. (R. 227).

ISSUES PRESENTED

I WHETHER THE ARIZONA SCHOOL TRUST FUND MUST BE COMPENSATED FOR THE TOTAL FULL APPRAISED VALUE OF ANY LAND TAKEN BY THE FEDERAL GOVERNMENT IN A CONDEMNATION ACTION

II WHETHER UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND SEC. 28 OF THE NEW MEXICO-ARIZONA ENABLING ACT AND OTHER APPLICABLE LAW A LESSEE OF ARIZONA'S SCHOOL TRUST LANDS HAS A COMPENSABLE INTEREST IN LEASED LANDS WHEN SAID LANDS ARE ACQUIRED BY CONDEMNATION PROCEEDINGS

III WHETHER UNDER SPECIFIC LEASE PROVISIONS THE LESSEE OF ARIZONA'S SCHOOL TRUST LANDS IS PRECLUDED FROM CLAIMING OR BEING AWARDED A COMPENSABLE INTEREST IN THE SUBJECT PROPERTY (OTHER THAN FOR IMPROVEMENTS) WHEN THE LAND IS ACQUIRED BY CONDEMNATION

IV WHETHER OR NOT A LESSEE HAS A COMPENSABLE INTEREST IN STATE SCHOOL TRUST LANDS, THE EXTENT OF THE LESSEE'S AWARD MAY NOT BE BASED ON A PROBABLE OR ANTICIPATED RENEWAL OF AN EXISTING LEASE ON SCHOOL TRUST LANDS

ARGUMENT

I

WHEN SCHOOL TRUST LANDS ARE TAKEN BY EMINENT DOMAIN, THE TRUST MUST BE COMPENSATED FOR THE TOTAL FULL APPRAISED VALUE OF THE LAND TAKEN BY THE FEDERAL GOVERNMENT

The Enabling Act grants made by the United States to the State of Arizona were made subject to the conditions imposed by Congress in the Enabling Act. Section 28 of the Act prescribes detailed conditions under which the granted lands were to be administered. This Section is set forth in Appendix A to the Petitioner's Opening Brief.

Article X of the Arizona Constitution is practically a rescript of Section 28 of the Enabling Act. Under Section 1, Arizona accepted the lands. This section states:

> All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in said Enabling Act and in this Constitution provided, and for the several objects specified in the respective grant-

> ing and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

The terms of sales, including the provisions for appraisal, advertising, public auction and sale are set forth in Sections 3, 4, 5, and 9. Sections 2 and 8 relate to the effect upon sales if there is non-compliance with the Enabling Act and provisions of the Constitution. These sections state:

> Section 2. Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands (or the lands from which such money or thing of value shall have been derived) were granted or confirmed, or in any manner contrary to the provisions of the said Enabling Act, shall be deemed a breach of trust.
>
> * * *
>
> Section 8. Every sale, lease, conveyance, or contract of or concerning any of the lands granted or confirmed, or the use thereof or the natural products thereof made to this State by the said Enabling

> Act, not made in substantial conformity with the provisions thereof, shall be null and void.

Under the above provisions, the State can only dispose of the trust and institutional lands in conformity with the provisions of that Act and Constitution. The terms of these documents require an appraisal, advertising, public auction and sale to the highest and best bidder. These provisions for sale were carried forward to the statutes by our Legislature. (Art. 3, Ch. 2, Title 37, Arizona Revised Statutes).

The United States Supreme Court in Lassen v. Arizona, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967), considered the applicability of the Enabling Act upon the administration of Arizona trust and institutional lands. The questions presented to the Court which related to the condemnation of school trust lands by the Arizona State Highway Department were as follows:

1. Must the State of Arizona, in converting school trust lands to another public use, follow the advertising, auction and sale procedures for

disposition of such land as set forth in Sec. 28 of the Enabling Act?

2. What standard of compensation must be employed to recompense the trust for land which through an eminent domain action is converted to another public use?

In responding to the first question, Mr. Justice Harlan, speaking for the Court, observed that the restrictions on the sale of the trust land under Section 28 of the Enabling Act were imposed to prevent exploitation of the trust for private advantage and to guarantee that the trust received appropriate compensation for the trust lands; requiring strict adherence to the Enabling Act disposition requirements when the land was being acquired by the State would sanction an empty formality. In view of the fact that after a sale the State could condemn land which it failed to purchase at auction, the Court observed that it "could not see that the trust would materially benefit from this circuity." Lassen v. Arizona, supra, at 587. The Court concluded:

> We conclude that it is consonant with the Act's essential purposes to exclude from the restrictions in question the transactions at issue here. The trust will be protected, and its purposes entirely satisfied, if the State is required to provide full compensation for the land it uses. We hold, therefore, that Arizona need not offer public notice or conduct a public sale when it seeks trust lands for its highway program. The state may instead employ the procedures established by the Commissioner's rules, or any other procedures reasonably calculated to assure the integrity of the trust to prevent misapplication of its lands and funds.
>
> 87 S.Ct. at 588.
> (Emphasis supplied)

The State of Arizona submits that under the authority of , and the guidelines set forth in the Lassen decision, federal condemnation procedures or direct sales to the federal government are a proper vehicle for the sale of State trust lands so long as the State is provided full compensation for the lands which assure the integrity of the trust.

A direct sale to the federal government is authorized in the Lassen case and under Arizona Revised Statutes (hereinafter cited as A.R.S.) § 37-232 which provides in part as follows:

> A person desiring to purchase state lands, or the lessee of any leased school or univeristy land entitled to reimbursement for improvements thereon, may make a verified written application to the state land department.

Under this circumstance the sale would take place upon completion of an appraisal and a determination that the interest of the state would not be prejudiced thereby, which under threat of condemnation would be at best highly unlikely. (A.R.S. § 37-236). In the event the land is sold, the lessee has no right to receive any portion of the sale price of the land, but is only entitled to receive the appraised value of the improvements which were placed on the property with the approval of the State Land Commissioner. (A.R.S. § 37-242.A). Under this procedure the school trust account receives the full appraised value of the land being sold for public purposes. Had the federal government made application to purchase the land, the purchase price which the trust would have realized is $115,020. Any transaction, condemna-

tion or otherwise, which results in a lesser amount being deposited to the school trust account results in a sale or other disposal of lands from the trust at less than the true appraised value and is expressly prohibited by Section 28 of the Enabling Act.

The second question considered in the Lassen decision, (what standard of compensation must be employed to recompense the trust in condemnation proceeding) is determinative of the question of distribution presented here. In the factual circumstance of the Lassen case, the Arizona Highway Department, under authority of decisions from the Arizona Supreme Court, attempted to acquire rights of way for highway purposes across school trust lands without compensating the trust for the value of the lands taken. The theory of the Highway Department and the Arizona Supreme Court was that integrity and res of the trust was being maintained by the enhancement and increase in value of the remaining trust lands after the highway improvement. In the Lassen opinion the Court rejected the enhance-

ment theory of compensation and further observed:

> The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given. First, it requires that before trust lands or their products are offered for sale they must be "appraised at their true value" and that "no sale or other disposal . . . shall be made for a consideration less than the value so ascertained . . . ." The Act originally provided in addition that trust lands should not be sold for a price less than a statutory minimum. Second, it imposes a series of careful restrictions upon the use of trust funds. As this Court has noted, the Act contains "a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose." Ervien v. United States, 251 U.S. 41, 47, 64 L.Ed. 128, 130, 40 S.Ct. 75. The Act thus specifically forbids the use of "money or thing of value directly or indirectly derived" from trust lands for any purposes other than those for which that parcel of land was granted. It requires the creation of separate trust accounts for each of the designated beneficiaries, prohibits the transfer of funds among the accounts and directs with great precision their administration. "Words more clearly designed . . . to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen." United States v. Ervien, 246

F. 277, 279. All these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust.

87 S.Ct. at 588-89
(Emphasis supplied)

The Court further stated:

Nothing in these restrictions is explicitly addressed to acquisitions by the State for its other public activities; the Enabling Act is, as we have noted, entirely silent on these questions. We must nevertheless conclude that the purposes of Congress require that the Act's designated beneficiaries "derive the full benefit" of the grant.

87 S.Ct. at 589
(Emphasis supplied)

The Court therefore held:

We hold therefore that Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights of way which it obtains on or over trust lands. This standard most clearly reproduces the results of the auction prescribed by the Act, and most consistently reflects the essential purposes of the grant.

87 S.Ct. at 590
(Emphasis supplied)

Applying the provisions of the Enabling Act and the Lassen opinion to the distribution of the proceeds in the present case, Arizona submits that in a condemnation proceeding the only way the integrity of the trust can be fully protected, the results of an auction most nearly reproduced and the full benefit of the grant derived is by awarding the full appraised land value, as determined by appraisal, to the State Land Department for deposit to the trust accounts. To award a lessee a portion of the award in a condemnation action which he could not under any circumstances receive in a direct sale of the subject property is not by any measure a standard which most nearly reproduces the result of the auction. The conclusion that Arizona had no authority to grant Alamo compensable interest in school lands and Alamo has no interest in the land entitling it to compensation, set forth by the Ninth Circuit Court of Appeals, is correct. The trust must receive the full appraised value of the land taken in a condemnation action.

ARGUMENT

II

THE LESSEE OF ARIZONA'S SCHOOL TRUST LANDS HAS NO COMPENSABLE INTEREST IN LEASED LANDS WHEN SAID LANDS ARE ACQUIRED BY CONDEMNATION PROCEEDINGS

Arizona is well cognizant of the requirement that the Fifth Amendment of the Constitution of the United States requires that private property may not be taken for a public use without just compensation. However, in exercising the authority of eminent domain, it must first be established that claimants to a just compensation are owners of the land. The term "owner" includes any party having a compensable interest in the land which is the subject of the acquisition. 2 Nichols, Eminent Domain, § 5.1[3], pp. 5-22, 23. Under the Fifth Amendment only the owners of interests in the property are entitled to compensation. U.S. v. Honolulu Plantation Co., (CA Hawaii 1950)182 F.2d 172, cert. denied 340 U.S. 820, 71 S.Ct. 51, 95 L.Ed. 602; Hunter v. U.S., 159 Ct. Cl. 356 (1962). The federal government must only compensate for a legally recognized interest in real property. U.S. v. Petty Motor Co., 327 U.S. 372,

66 S.Ct. 596, 90 L.Ed. 727 (1946).

The Ninth Circuit Court of Appeals was correct in its observations that while the Fifth Amendment prohibits the taking of private property without just compensation, this provision only guarantees to Alamo the right to compensation if they had obtained from Arizona a property right superior to or equal to the trust. However, under the Enabling Act, Arizona, as trustee, had no power to grant a compensable property right to Alamo. Alamo therefore never acquired a property right for which it is entitled compensation.

This conclusion is supported by provisions of Sec. 28 of the New Mexico-Arizona Enabling Act, which provides in part:

> No mortgage or other encumbrance of the said lands, or any part thereof shall be valid in favor of any person for any purpose or under any circumstance whatsoever.

An encumbrance has been defined as every right or interest in the land or estate which may subsist in another to the diminution of its value, or anything which impairs the use or transfer of or burdens the

title to such land or estate. Burns Trading Corp. v. Blue Front Market, 85 A.2d 320, 324, 17 N.J. Super. 61 (1951). A lease of land, which by its terms would not expire until after some time after delivery of a deed for realty is an encumbrance. Hecketsweiler v. Parrett, 200 P.2d 971, 974, 185 Or. 46 (1948); City of San Antonio v. Guadelupe-Blanco River Authority, (Tex. CA) 191 S.W.2d 118, 124. An encumbrance is an interest in land which may subsist in a third person to diminution of value of land but consistent with the passing of the fee by conveyance, hence an outstanding lease for a period of years is an encumbrance. Hartman v. Drake, 87 N.W.2d 895, 898, 166 Neb. 87 (1958).

Thus the present case is one in which a lease is specifically authorized by Sec. 28 of the Enabling Act which also prohibits the sale of the land unless the trust is compensated for the full appraised value of the land, and further restricts the lease from constituting an encumbrance insofar as the lessee's obtaining a

compensable interest or vested right in the property. While the lessee has a possessory right, so long as the state continues to determine that it is in the best interest of the trust to lease the land for a particular purpose, the lessee can have no rights which permit him to participate in the proceeds of the value of the land in the event the property is sold.

Arizona recognizes that a lessee of state school trust land under Arizona Statutes has a preferential right to renewal of a lease of state lands over other applicants for the lease. Such preferential rights are contained in A.R.S. § 37-291 (Appendix to Petitioner's Opening Brief at 10).

As is readily apparent after reading the statute, preferential rights of renewal are rights granted to a lessee only after the determination has been made by the State Land Commissioner that it is in the best interest of the state to re-lease the land in question.

The Arizona Supreme Court in Manning v. Perry,

48 Ariz. 425, 62 P.2d 693 (1936), considered the preferential right of renewal as it applies to the State, a lessee and an adverse claimant. Therein the Court stated:

> It is quite true that the preferred right to a renewal of a lease is not a contractual right between the lessee and the state, enforceable as against the state. If it were, the prohibition in the Enabling Act (section 28) against the leasing of the state's public lands for a period of longer than 5 years without advertisement could be evaded. So, as between the state and the lessee, this provision of the law gives no right. When, however, the Land Department is called upon to decide to which of two or more conflicting applicants a lease to state land shall be given, this statutory preference right can, and should, be considered by the department.

As between the state and the lessee, the preferential right to renew may be enforceable after the decision to re-lease the land has been made; however, the right cannot be considered to be a contractual right enforceable against the state and a subsequent purchaser, thereby entitling a lessee to participate in the proceeds of the sale. To so conclude would validate an encumbrance in specific

violation of Sec. 28 of the Enabling Act.

Alamo relies on the case of Ehle v. Tenney Trading Co., 56 Ariz. 241, 107 P.2d 210 (1940), to support the argument that the lessee has a compensable interest in state school trust property, noting that the case upheld the preferential right to renewal, recognizing that it is a "valuable, substantial right." (Petitioner's Opening Brief, p. 8, f. 12; p. 11). The Ehle case arose between two lessees after a determination to lease the trust property had been made. The case did not involve any consideration of rights a lessee might have in trust land as against the state itself. Recognizing that a lessee has a substantial right as against other potential lessees can in no way support the conclusion that a lessee has a compensable interest in the property in the event of a sale. If such were the conclusion, the Ehle case must be deemed to have been overruled by the Lassen case, supra.

Alamo also argues that Nebraska v. United States, 164 F.2d 866 (CA 8th Cir.), cert. denied 334 U.S. 351

(1948), which concluded that Nebraska school lands must be treated as any other private property and just compensation for such lands taken by condemnation must be allocated or apportioned between the state and a lessee on the basis of their relative values should be followed here. The case was determined nearly 20 years prior to the Lassen case. As correctly recognized by the Ninth Circuit Court, the Nebraska case can be readily distinguished from the present because the Nebraska Enabling Act contains none of the restrictions on sale or disposal of school trust lands that are contained in Sec. 28 of the New Mexico-Arizona Enabling Act.

Sec. 7 of the Nebraska Enabling Act, U.S. Stat. at Large, Vol. 13, p. 47, provides as follows:

> And be it further enacted, That sections number sixteen and thirty-six in every township, and when such sections have been sold or otherwise disposed of by any Act of Congress, other land equivalent thereto, in legal sub-divisions of not less than one quarter section, and as contiguous as may be, shall be and are hereby, granted to said state for the support of the common schools.

With a lack of any congressionally imposed restrictions relating to the sale or disposal of the lands, the 8th Circuit Court's decision in Nebraska v. U. S., supra, appears to be correct and consistent with the Lassen case as well as the decision of the Ninth Circuit Court. In light of the congressionally imposed trust restrictions on Arizona's school trust lands, and the Lassen decision, Nebraska v. U.S. cannot have any application to the instant case.

It is particularly interesting to note that while the Nebraska Enabling Act, supra, does not contain any specific trust restrictions on disposal or sale of the school property, a trust was nevertheless implied in the case of U.S.A. v. 78.61 Acres of Land, 265 F.Supp. 564 (D. Neb. 1967). By applying the Lassen decision to the Nebraska school lands, the Court required the Bureau of Reclamation to pay for rights of way over Nebraska's school lands.

Since the Lassen case, supra, the trend appears to be toward strict enforcement of trust restrictions on school trust lands. E.g., see Farmers Investment

Co. v. Pima Mining Co., 111 Ariz. 56, 523 P.2d 487 (1974). The instant case should not be an exception.

Alamo relies on State ex rel Highway Comm'n v. Chavez, 80 N.M. 394, 456 P.2d 868 (1969). This case is apparently relied on for the proposition that a lessee has a compensable interest in state public lands. It is not clear whether the lands involved were New Mexico school trust lands, so it can only be concluded that if trust lands were involved, the question of whether the trust restrictions precluded a lessee's right to participate in a condemnation award was not litigated.

State ex rel State Highway Comm'n v. Chavez, 77 N. M. 104, 419 P.2d 759 (1966), cited by Alamo, involved a lessee's right to participate in a condemnation award, but here the decision was reached prior to the United States Supreme Court's consideration and findings in the Lassen case, and has no apparent application to trust lands.

Construing other Arizona statutes cited by Alamo with Sec. 28 of the Enabling Act provisions

demonstrates the arguments set forth by Alamo regarding Arizona statutes are invalid. By enacting A.R.S. § 41-511.06 (Petitioner's Opening Brief, Appendix B, p. A-12) authorizing the Arizona State Parks Board to acquire property for State Park purposes, the Arizona Legislature required that the Parks Board pay the lessee of state and federal land when acquiring the property for Park purposes. Without addressing the State constitutional problems raised by the statute,[1.] this statutory provision cannot permit interference with the Enabling Act requirement that the trust be compensated for the full value of the land taken through eminent

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1. Article 9 § 7 of the Constitution of Arizona prohibits donation or grant of State property; whether A.R.S. § 41-511.06, which requires payment for a property interest which may not be legally compensable violates this State constitutional provision, has not yet been tested in the Arizona judicial system.

domain. Consequently, under this statute the lessee's interest must be compensated in addition to payment to the trust of the full appraised value of the land.

A.R.S. § 37-231 (Petitioner's Opening Brief, App. B, p. A-6) requires appraisal of land prior to sale and is totally consistent with Sec. 28 of the Enabling Act requirements and Constitution of Arizona requirements cited, infra.

A.R.S. § 37-242 (Petitioner's Opening Brief App. B., p. A-6) creates the vehicle for protecting the lessee in the value of his improvements when that land is sold and is authorized by Sec. 28 of the Enabling Act. When the improvements are sold with the state land on installments, the state pays the lessee for the improvements from the general fund. No school trust monies are affected. Title to the trust land does not pass until the certificate of purchase for the land is fully paid or a partial patent is issued.

A.R.S. § 37-284 (Petitioner's Opening Brief App. B, p. A-7) establishes the method and procedure

for determining which of several applicants is entitled to lease a parcel of trust land; this statute is controlled by Manning v. Perry, supra, and is only applicable after a decision has been made to lease the particular parcel.

A.R.S. § 37-288 (Petitioner's Opening Brief App. B, p. A-8) only relates to the forfeiture of leases and delinquent payments and does not expand or limit a lessee's rights acquired under the lease and Sec. 28 of the Enabling Act.

A.R.S. § 37-290 (Petitioner's Opening Brief App. B, p. A-9) establishes a preferential right to lease land which has been reclassified. The statute does not require the land to be leased again, but gives the Arizona State Land Commissioner discretion to determine whether the sale, re-lease, or use of the land in any other manner is in the best interest of the trust. Consequently, A.R.S. § 37-290 is subject to the courts' direction set forth in Manning v. Perry, supra.

A.R.S. § 37-293 (Petitioner's Opening Brief, App. B, p. A-11) protects the lessee in the value of the improvements, as authorized, but does not permit

the lessee to claim an interest in the value of the land.

None of the Arizona statutes cited by Alamo are inconsistent with the provisions of Sec. 28 of the Enabling Act.

Any rights granted to a lessee under A.R.S. § 37-291 regarding preferential rights to renewal are not enforceable as against the State upon the sale of the property. Manning v. Perry, supra; Lassen v. Arizona, supra. To conclude otherwise would violate the specific provisions of the Enabling Act and would be contrary to the express language in the Lassen case.

The case which, in addition to the Lassen case, supra, is most determinative of the issue regarding a lessee's right to compensation for school trust land is U.S. v. Fuller, 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973). The arguments of Alamo regarding Fifth Amendment rights are totally rejected by the Fuller case which set forth the principle that payment need not be made for the added value to lands which are used in combination with lands to which rights may have been destroyed under the exercise of governmental authority other than the exercise of

eminent domain. Alamo's use of the state governmental lands was not absolute; under the provisions of the lease (Record on Appeal, p. 185 ¶ P), the lease could be cancelled or sold through reclassification. Additionally, under A.R.S. §§ 37-232 and 233 (Appendix A), any state trust land may be sold upon application of any person desiring to purchase state land (including trust land) or any lessee of school or university trust land entitled to reimbursement for improvements may make application to purchase the land. To conclude that the lease rights continue under those circumstances would constitute an "encumbrance" as discussed, infra, and would constitute an encumbrance in violation of § 28 of the Enabling Act.

The lease provisions (R. 185, ¶(Q) specifically provides ". . . no provisions of this lease shall create any vested right in the lessee herein." The intent of Congress in setting forth trust restrictions under § 28 of the Enabling Act and Arizona's inclusion of a specific lease provision clearly setting forth that no vested right be created in the lessee, precludes the lessee from claiming a compensable interest in the property on either direct sale or

sale through eminent domain. This is consistent with the dictates of U.S. v. Fuller, supra, as they relate to Taylor Grazing Act lands. 409 U.S. at 494.

The recitation in the Fuller case, supra, of language from United States v. Rands, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed.2d 329 (1967), is also particularly pertinent. In Fuller it is stated:

> . . . The Court's statement in Rands respecting portsite value is precisely applicable to respondents' contention here that they may aggregate their fee lands with permit lands owned by the Government for valuation purposes:
>
> "[I]f the owner of the fast lands can demand port site value as part of his compensation, 'he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses . . . . To require the United States to pay for this . . . value would be to create private claims in the public domain." 389 U.S. at 125, 19 L.Ed.2d 329, quoting United States v. Twin City Power Co., 350 U.S. at 228, 100 L.Ed. 240.

35 L.Ed.2d at 21.

Alamo is attempting here to require the United

States to pay for land in which the lessee has no vested interest and would create private claims in the state school trust lands granted to Arizona under the Enabling Act. The Fifth Amendment does not require it. Sec. 28 of the Enabling Act does not permit it.

Alamo argues that the fact that the state land in question is isolated supports the position that the land is relatively of no value unless used in conjunction with other property owned or controlled by Alamo. This certainly was not the conclusion of the United States appraiser who appraised the land as separate parcels independent from the Alamo ranch operation. Further, in Arizona the state as well as private landowners may exercise the authority of eminent domain for private way of necessity under A.R.S. §§ 12-1201 and 1202 which provide as follows:

> § 12-1201. Private way of necessity defined
>
> "Private way of necessity" as used in this article means right of way on, over, across, or through the land of another for means of ingress and egress,

and the construction and maintenance thereon of roads, overhead transmission lines, pole line, power lines, canals, ditches, flumes, shafts, tunnels, pipe lines, drains, including, but not limited to, embankments, diversion dams, dikes, ditches, canals, flumes and levees for the purpose of removing water from land or preventing accumulation of water on land, and tramways, including, but not limited to, aerial tramways and industrial railroads, for mining, milling, lumbering, agricultural, domestic or sanitary purposes.

§ 12-1202. Right to private way of necessity; limitation

A. An owner of or a person entitled to the benefi cial use of land, mines or mining claims and structures thereon, which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity over, across, through, and on the premises, may condemn and take lands of another, sufficient in area for the construction and maintenance of the private way of necessity.

B. If the condemnation is upon, over, or affects the range lands of another, the area condemned shall be strictly defined, and livestock driven upon or over the private way shall be accompanied by and under the control of sufficient drivers or herders to confine the livestock to the condemned area, and the livestock shall be so confined to that area and kept moving directly across the property condemned until they have been completely removed from the condemned area.

Alamo further argues that enhancement of the state lands because of use in conjunction with lessee's other holdings enhance the value of the state lands thereby creating that increased value. This is certainly an attempt to pick one's self up by the bootstraps to claim a vested compensable interest in state trust lands. A similar attempt was rejected in the Fuller case, supra. Additionally, there was no appraisal evidence regarding enhancement. The only testimony presented was the speculation presented by Alamo's witness, W.D. Davis, who did not appraise the property. There is therefore no appraisal evidence to support Alamo's enhancement argument and it should not be considered. Ramsey v. United Mine Workers of America, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64, on remand 481 F.Supp. 1029, appeal after remand, 481 F.2d 742, cert. denied 414 U.S. 1067, 94 S.Ct. 576, 39 L.Ed.2d 473, discussion under sylabus 4, 91 S.Ct. 658, 664, 665.

If Alamo has a compensable interet in the subject property, only then is it entitled to argue that

the appraisal concept of enhancement applies to the land in question and should be the basis for increasing an award for Alamo. See 2 Nichold, Eminent Domain, § 5.1[3] which sets forth that an "owner" claiming compensation must have a compensable interest in the property subject to acquisition.

The representations made by Alamo and Amicus Curiae Brief in support of petiton for certiarari by the Federal Land Bank of Wichita and the Federal Intermediate Credit Bank of Wishita and many listed production credit associations and the Amicus Curiae Brief of the State of New Mexico attempt to ignore the restrictions set forth in Sec. 28 of the New Mexico-Arizona Enabling Act which rejects the validity of any mortgage or encumbrance against the land. It seems these Amicus Curiae are attempting to have this Court extracate them from the problems created by their poor business judgment at the expense of the school trust. Secondly, Arizona submits that the fact that the loans are probably secured by the private property as well as improvements on the state property and that the loans are based on ability of

the rancher to produce sufficient revenue to retire the loan rather than the market value of the property, demonstrate that the allegations of loan losses are hollow. In any event the fact that the lessee placed a mortgage on his business operation, private land and improvements is not sufficient basis to declare a legally compensable interest in a lessee.

There is no legal authority which creates or vests any leasehold rights in Arizona's school trust lands in a lessee or which entitles a lessee to participate in a condemnation award relating to land values. The decision by the Ninth Circuit Court of Appeals which determines that the state has no authority to grant a compensable interest to the lessee is correct and should be affirmed.

ARGUMENT

III

UNDER SPECIFIC PROVISIONS OF THE LEASE A LESSEE OF ARIZONA'S SCHOOL TRUST LANDS IS PRECLUDED FROM CLAIMING A COMPENSABLE INTEREST IN THE SUBJECT PROPERTY (OTHER THAN FOR IMPROVEMENTS) WHEN THE LAND IS ACQUIRED BY CONDEMNATION

It is recognized that in a condemnation action, specific provisions of a lease control a lessee's right to receive compensation or to participate in the condemnation award. United States v. 15.3 Acres of Land, 154 F.Supp. 770 (D.Ct. Pa. 1957). A lessee is charged with the knowledge that a lease may be terminated under provisions of the lease and the applicable law. U.S. ex rel Tennessee Valley Authority v. Birmingham Ferry Co., 79 F.Supp. 569 (D.Ct.Ky. 1948).

An examination of the specific provisions in the instant case defeats any right Alamo may have in the condemnation award as it relates to other than the value of the improvements. The lease at issue here specifically provides the following:

> (1) IT IS HEREBY COVENANTED AND AGREED by both parties hereto, that this lease

> is issued subject to all the provisions and requirements thereto, which are found in the various Acts of the Legislature of the State of Arizona, the same as though they were fully set forth herein.
>
> (Record on Appeal) p. 182
>
> and (2) (H) That the lessor saves and reserves the right to relinquish to the Federal Government, at any time, the State's right of claim to any part of the land described herein, and thereupon this lease will be null and void insofar as it relates to the land the State has so relinquished.
>
> (3) (P) This lease is offered by the lessor and is accepted by the lessee with the express understanding, notwithstanding any provisions herein to the contrary, that it may be terminated by the State Land Commissioner upon thirty (30) days written notice at any time as to any land which may be reclassified as agricultural, commercial or homesites. The State Land Commissioner expressly reserves complete discretion in respect thereto.
>
> (4) (Q) The terms, conditions and covenants of this lease are subject to present laws relating to state lands and the rights of both lessor and lessee hereunder are each and all subject to such modification as may be consistent with such amendments, revisions or repeals of existing laws as may hereafter be made, and no provision of this lease shall create any vested rights in the lessee herein.
>
> (Record on Appeal p. 185

In condemnation the federal government has the responsibility to only compensate for legally recognized interest in real property. U.S. v. Petty Motor Co., supra.

The supplemental condition (4)(Q) of the lease supra, specifically provides that the lease creates no vested rights in the lessee. This specific provision of the lease impliedly constitutes a condemnation clause and is not a legally recognized interest in real property which entitled a lessee to participate in a condemnation award. The only recognized interest in school trust lands belongs to the state school trust.

Further, A.R.S. §§ 37-242 and 37-293 (Petitioner's Opening Brief, App. B. pp. A-6,-11) restrict a lessee's participation in the proceeds of a sale of the land to the value of the improvements. By specific inclusion of these applicable laws on sale of the property (by condemnation or otherwise) the lessee is precluded from receiving anything but the value of the improvements on the subject property. Adding consideration of the termination provision, and the provision for relinquishment to the federal government

and the Lassen and Fuller cases, supra, it should only be construed that the lease provisions preclude the lessee from claiming a compensable interest in the subject property.

The Ninth Circuit Court of Appeals did not find it necessary to reach this argument. Nevertheless, the argument defeats Alamo's claim to a right to participate in the condemnation award.

ARGUMENT

IV

IF LESSEE HAS A COMPENSABLE INTEREST IN STATE SCHOOL TRUST LANDS, THE EXTENT OF THE LESSEE'S AWARD MAY NOT BE BASED ON A PROBABLE OR ANTICIPATED RENEWAL OF AN EXISTING LEASE ON SCHOOL TRUST LANDS

Assuming, arguendo, that a lessee of state school trust property has a right to participate in the distribution of the award in condemnation of such property, it must be recognized that the congressional restraints imposed by Sec. 28 of Arizona's Enabling Act as interpreted by the Lassen case, must be followed in making a distribution of condemnation award, thereby assuring that the trust is compensated the true appraised value of the lessor's interest.

In proceedings below, the witness Davis, testifying on behalf of Alamo based his opinions of distribution on a capitalization of Arizona's income stream for a speculative period of 36 years, and the "present value" of the property at the end of a hypothetical lease period (projecting that the market value of the real property

in question would not increase in value during that period of time).

The method of determining the amount of rental which the State Land Department may charge on a grazing lease is set forth in A.R.S. § 37-285.B:

> All grazing land shall be classified and appraised on the basis of its animal carrying capacity. The annual rental rate for grazing land shall be the amount determined by multiplying the carrying capacity of the lands by the annual rental rate per animal unit. The annual rental rate per animal unit shall be twnety-two per cent of the average market price of cattle for the preceding year. The rental rates on all lands other than grazing lands shall be as determined by the commissioner, subject to the provisions of subsection A.

It is recognized that the rental received by the State Land Department on a grazing lease did not yield a sound economic return to the State when considered in light of the value of the land but rather constitutes a "bargain" to a lessee. (Deposition of W. J. Fish, Jr., Rowe Appraisal, Ex. D., pp. 12-13). This conclusion is also supported by an examination of the testimony of W. R. Davis. (T. 73-74). When the relationship of the rental value to the market

value of property is too remote to merit consideration, evidence of such rental value or of the existing rents which establish rental value is inadmissible and should not be used as a determination of valur. Olsen v. U.S., 67 F.2d 24, aff'd 292 U.S. 247, 54 S.Ct. 704, 78 L.Ed. 1236; Welch v. Tennessee Valley Authority, 108 F.2d 95, cert. den. 309 U.S. 648, 60 S.Ct. 889, 84 L.Ed. 1030. A determination of the value of school lands for the purpose of establishing a basis for the computation of rent to be paid by a lessee does not fix the value which the State is entitled to receive for the land when taken in eminent domain proceedings. Nebraska v. Platte Valley Public Power Irrigation Dist., 147 Neb. 289, 23 N.W.2d 300, 166 A.L.R. 1196. See also Am.Jur., Eminent Domain, §§ 240 et seq. In Nebraska v. Platte, it is recognized that the right of a lessee of state school land to a renewal of a lease if someone does not bid higher is not one that should be determinative of the value of a leasehold on a taking in eminent domain.

In Scully v. United States, 409 F.2d 1061 (10th

Cir. 1969), the Court considered the question of whether a compensable leasehold interest could be established by custom and usage. The Court stated:

> It is abundantly clear that to read a right of renewal into the present lease would not be a fair interpretation, even in view of an understandable sympathy for the lessee in this context. It is one thing to rely upon custom and usage to clarify incidental problems of lease interpretation, but it is quite another to extend the term or duration of the tenancy through such dubious means. Aside from the obstacle presented by the Statute of Frauds, it is necessary to reflect upon the additional confusion that would be created if all leasehold estates were extended in the face of explicit language to the contrary.
>
> 409 F.2d at 1065.

In the Scully case, the Court further concluded that in computing how a condemnation award should be divided between lessor and lessee, the mere expectation that a lease would be renewed does not add to the market value of land. In support of this conclusion, the Court cited two cases: U.S. v. Petty Motor Co., supra, where the Supreme Court noted that

"the fact that some tenants had occupied their leaseholds by mutual consent for long period of years does not add to their rights." (Id. at 380); and Emery v. Boston Terminal Co., 178 Mass. 172, 59 N.E. 763 (1901), wherein it was determined that in a condemnation action compensation paid for property held by a lessee could not include the value of an expectancy that a short term tenancy or lease would be renewed. The Court declared:

> Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of petitioner's holding, they could not be taken into account . . . . They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right.
>
> 59 N.E. at 765.

In the proceedings below, the witness Davis' direct testimony was predicated on an incorrect legal assumption. Mr. Davis capitalized the State's

(lessor's) rental receipts from the grazing lease based on an anticipated renewal, which is an invalid method of appraisal as set forth above. Recognizing a preferential right to renewal of state school trust lands is not a basis for increasing a lessee's term of lease, thereby diminishing the lessor's interest in the condemnation award. The observations of the witness Davis and the opinion and judgment of the District Court below should not be accepted by this Court as they incorrectly rely on an expectancy that a relatively short term lease will be renewed for up to three 10-year terms.

Assuming that Alamo has a compensable interest in this case, the only valid testimony concerning the marketability of such interest was elicited from the witness Davis on cross examination. He testified that cattle ranches in Arizona were usually sold on the basis of animal unit carrying capacity and that this is a valid and acceptable method of appraisal. He also testified concerning certain representative sales of cattle ranches where state land under lease

was included as part of the transfer. The sales indicated that a grazing lessee of state school trust lands could sell his interest in the leasehold on the open market for between $225 to $703 per animal unit carrying capacity. (T. 73-74, 83-84). The total carrying capacity for the two sections involved in this case is 8 animal units. Even assuming that this land is prime grazing land, which might yield top value per animal unit to Alamo in the sale of the leasehold, the maximum amount to which Alamo is entitled in this action is 8 animal units times $703 per unit, or $5,624 for the land and $3,600 for the improvements, a total of $9,224.

Other suitable alternatives available which could be adopted under a valid distribution were indicated in the Rowe appraisal (Ex. D, admitted into evidence) which establishes Alamo's interest in the bargain of the leasehold at $3,200 (plus the value of improvements for a total lessee's award of $6,800); or the distribution as determined by the witness William Fish, Jr., who concluded that

Alamo should receive only the value of the improvements which it placed on the subject property, taking into consideration the special provisions of the lease. (Exhibit B) and A.R.S. §§ 37-242 and 37-293 which implement the provisions of Sec. 28 of the Enabling Act authorizing a lessee to receive the value of improvements which he placed on the land in the event of sale or lease to another party.

The lessee's interest is very restricted under the specific terms of the lease. With a 30 day termination provision, the state's retaining the right to relinquish the land to the federal government and the express provision that the lease creates no vested right in the lessee, the determination of the Rowe appraisal or of the witness William Fish come closest to the legally compensable interest, if any, of the lessee. Arizona submits the amount of Alamo's portion of the condemnation award distributed by the District Court was excessive and constituted a windfall to lessee at the expense of the trust. Should this

Court determine that the lessee does have a compensable interest, it should be limited to one of the following: (1) either $9,224 under the Davis market data showing the value on the sale of state grazing leases based on $703 per animal unit, (2) $6,800 as advanced by the Rowe appraisal, or (3) $3,600 for improvements only.

CONCLUSION

In the case of U. S. v. Certain Property Located in Borough of Manhattan, 344 F.2d 142, (2d Cir. 1965), it was recognized that in condemnation actions the applicable law should not be applied in such a manner as to allow a lessee an "indefensible windfall".

In view of the specific provisions of the Enabling Act, applicable law and the provisions of the lease, to overturn the decision of the Ninth Circuit Court of Appeals would only result in an "indefensible windfall" to the lessee. Under NO other circumstances would lessee be able to participate in the proceeds of the sale of the land other than to recover the value of the improvements placed thereon. That the land is being acquired by eminent domain rather than by direct sale or auction does not relieve Alamo or Arizona from complying with the requirement of the Lassen case, supra, that the trust be actually compensated for the full appraised value of the land, using a standard which "most clearly reproduces the result of

the auction prescribed by the [Enabling] Act and most consistently reflects the essential purposes of the grant." 87 S.Ct. at 590. Concluding the Lessee of school trust lands has a vested compensable right in the value of trust land sold through eminent domain clearly does not reproduce the result of the auction and does not reflect the essential purpose of the grant. Therefore, Arizona respectfully submits that the decision of the Ninth Circuit Court of Appeals should be affirmed.

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APPENDIX A

Arizona Revised Statutes

§ 37-232. Application to purchase state lands or for reimbursement for improvements

A person desiring to purchase state lands, or the lessee of any leased school or university land entitled to reimbursement for improvements thereon, may make a verified written application to the state land department to purchase the land. The application shall contain the name, age and residence of the applicant and a description of the land sought to be purchased. If a lessee of school or university lands is the applicant, the application shall contain the date the lease of the land was issued to him. If the applicant has or claims the right of possession by instrument in writing from a former lessee, the application shall contain the name of his assignor or grantor, the date of the original lease and the date of the assignment, and he shall attach to his application the original instrument of assignment, or if lost, furnish proof of loss. If applicant claims by judgment of a court or by operation of law, he shall attach to the application a certified copy of the instrument giving him such right. If the application is by one claiming a right to reimbursement for improvements placed on leased school or university lands, he shall set forth in the application a list of improvements made upon the land.

§ 37-233. Sale of lands upon application; restriction on sale of timber land; expense of sale

A. Upon receipt of the application, the state land department, under the rules and regulations of the department, shall cause the lands to be sold if the sale of them is nor prohibited by law. Land

containing timber of a value which in the opinion of the commissioner should be sold separately from the land, shall not be subject to sale until after the timber is sold.

B. When an application is filed with the department for selection or sale of land under the laws of this state, the department determines that the benefit to be derived from the selection or sale is less than the expense involved, he may accept from the applicant an amount of money sufficient to pay the expense incidental to the selection or sale, but if the applicant fails to secure a lease after selection of land, or fails to purchase land after bidding for it, the successful lessee or purchaser shall reimburse the original applicant for all funds so advanced.

CERTIFICATION

PETER C. GULATTO, being duly admitted to practice before the Supreme Court of the United States, herewith certifies that three copies of the Respondent's Brief have been delivered to the following by depositing the same in the United States mail, postage prepaid, to:

J. Gordon Cook
11 West Jefferson Street
Phoenix, Arizona 85003
Attorney for Petitioner

Solicitor General
Department of Justice
Washington, D. C. 20530

Richard Allemann
Assistant U.S. Attorney
Federal Building
Phoenix, Arizona 85025

this 28th day of July, 1975.

Peter C. Gulatto

Subscribed and sworn to before me this 28th day of July, 1975.

Notary Public

My Commission Expires Oct. 18, 1978

Supreme Court, U. S.
FILED
OCT 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-125

ALAMO LAND & CATTLE CO., INC.,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

PETITIONER'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-125

ALAMO LAND & CATTLE CO., INC.,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

PETITIONER'S REPLY BRIEF

QUESTION PRESENTED I

Arizona's Brief does no more than point up the basic inquiry of Petitioner's Question Presented I, which is whether Section 28 of the *Act* clearly manifests a Congressional intent that upon condemnation a lessee from Arizona shall have no compensable property right, except the value of the lessee's

improvements. The Opinion below of the United States Court of Appeals, 9th Circuit, found in the Appendix to the Petition for Writ of Certiorari, 9th Cir. 1974, 495 F.2d 12, recognized such issue by saying:

> "The Fifth Amendment provides that private property may not be taken for a public use without just compensation. See United States v. Fuller, 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973). That provision would guarantee to Alamo the right to compensation if they had obtained from Arizona a property right superior to or equal to the trust. However, under the Enabling Act, Arizona, as trustee, had no power to grant a compensable property right to Alamo. Alamo therefore never acquired a property right for which it is entitled to compensation." 495 F.2d at 14.

Section 28 is silent about condemnation. Although one paragraph begins with a prohibition against a mortgage or other encumbrance of the lands, the same paragraph carefully provides in part,

> "Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less;".

It is this wording that Petitioner contends gave, in spite of the above logic of the Court of Appeals below, Arizona the power to grant a compensable property right to Alamo. In reliance upon basic principles of agency and trust law, plus specific

on-point case law,[1] Petitioner contends Congress delegated to Arizona, as trustee, the discretion to lease with or without a condemnation clause. Here, apparently to make the leasing more attractive and to enhance the leasing possibilities,[2] Arizona chose to lease without a condemnation clause.

Lassen v. Arizona Highway Dep't., 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967), said:

> "We must nevertheless conclude that the purposes of Congress require that the Act's designated beneficiaries 'derive the full benefit' of the grant." 87 S. Ct. 584 at 589.

and,

> "The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given." 87 S. Ct. 584 at 588.

While this wording is applicable to the *Lassen*

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1. Saying a school trust lessee does have a property right or an interest compensable in condemnation.

2. See Amicus Curiae briefs of New Mexico, some of its lessees and of lending institutions in support of the Petition for Writ of Certiorari herein, which evidence real concern for the future of state grazing lessees if the Opinion below stands which Opinion, in effect, adds a condemnation clause to the lease, by preventing the lessee from sharing in condemnation proceeds, except as to improvements.

determination that Arizona must pay eminent domain compensation in money, it should not be literally applied herein when unfettered discretion is given to the Arizona Legislature which delegated such to Arizona's Land Department[3] to determine the manner of leasing. The *Act's* provisions that prohibited the sale of lands for less than their appraised value do not say that a lessee may not share in condemnation proceeds, nor is such said in the provisions about setting up a separate fund for the objects for which the grants are made or confirmed. These are the provisions relied on in *Lassen*. The Arizona Legislature was still given the right to determine whether in its judgment and discretion it should lease with or without permitting the lessee to share in condemnation proceeds. Who should know better than the local entity, based upon the exigency of the situation at the time of leasing, whether more money or more leasing could be accomplished by not requiring a condemnation clause?

There is no reason why the United States of America should not be considered like any other trustor. Thus, solution lies in determining whether any trustee, whose duty is to act for the sole benefit of the trust beneficiary when the trust instrument gives to the trustee the right to lease and the discretion to determine the manner of leasing, may legally decide not to require a condemnation clause, thereby permitting the lessee to share in condemnation proceeds. The exercise of a trustee of the power to lease requires reasonable acting, and no more. *76 Am. Jur. 2d Trusts* § 478, at 695, 696; *90 C.J.S. Trusts* § 319 *a* and *b(1)*, at 496-498; *Richard v. Midkiff*, 48 Hawaii 32, 396 P.2d 49, 64; *In re Clayton's Estate*, 127 Colo. 592, 259 P.2d 617, 621; *Restatement of the Law of Trusts 2d* § 189. Arizona chose to introduce no testimony below to

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3. § 37-281 *A*, *A.R.S. 1956*.

challenge the reasonablness of its Land Department in not inserting a condemnation clause.[4] Instead, it challenged the basic authority from the *Act*. Basic agency law also supports Petitioner. Unless agreed to the contrary, authority to make a contract permits it to be done in the usual form or if there is not a usual form, then in an appropriate and reasonable manner. *2 Am. Jur. 2d Agency* § 84, second paragraph, p. 488; *Restatement of the Law of Agency 2d* § 51. This trust and agency law means Arizona had the power to decide whether to insert a condemnation clause, unless there was evidence, which there was not, that it acted unreasonably by so doing. No one said as many leases could be issued if such a clause was inserted. No one said cattle operator lessees would still get needed financing if such a clause were added. Such a clause is obviously a concern for otherwise why would New Mexico state lessees, New Mexico and financing institutions of state lessees have filed briefs in support of certiorari?

Arizona would destroy this logic by arguing that at a private sale Arizona would get all. But if this reasoning is applied to any lease without a condemnation clause where the landlord could terminate and sell, then it would mean the tenant could not, upon condemnation, receive the value of the leasehold. No case that Petitioner can find so holds. Instead, the law is that the existence of a clause permitting the landlord to terminate under certain conditions does not render the leasehold of no value, but is simply an element affecting value. *Canterbury Realty Co. v. Ives*, 153 Ct. 377, 216 A.2d 426; *State v. Yale Oil Corp. of South Dakota*, 88 Mont.

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4. Every presumption is in favor of a trustee's honest exercise of his discretion. *Neel v. Barnard*, 24 Cal. 2d 406, 150 P.2d 177. Obviously, the presumption stands in the absence of contrary evidence.

506, 295 P. 255; *State v. Keneally*, 142 Mont. 256, 384 P.2d 770; *Spencer v. Fargo*, 114 Conn. 527, 159 A. 349, and *Iron City Automobile Co. v. City of Pittsburgh*, 253 Pa. 478, 98 A. 679.

No specific wording in the *Act* prohibits the creation of a property right in Arizona's lessee. It is basic eminent domain law "that a tenant for years under a written lease is an owner of property in the constitutional sense, and is entitled to share in the compensation when all or a part of the property leased is taken by eminent domain under the term of the above lease[3]." *27 Am. Jur. 2d Eminent Domain* § 250, p. 21. Footnote 3 cites many state and federal cases as support for this statement, which includes two United States Supreme Court decisions, and *Nebraska v. United States*, 164 F.2d 866 (8th Cir. 1947), relied upon by Petitioner. The decision in *Nebraska*, as well as the decision of the Court of Appeals below, turned upon whether the pertinent enabling act created a property right in the state's lessee. *Nebraska* said yes, and the Court of Appeals below said no. The Court of Appeals below distinguishes *Nebraska* by saying:

> ". . . the Nebraska Enabling Act does not contain the express restrictions which are incorporated in the Arizona Act. United States v. 78.61 Acres of Land, 265 F.Supp. 564 (D.C.Neb.1967)." 495 F.2d 12 at 15.

Perhaps the reason the Court of Appeals below did not then enumerate the express restrictions is because, upon analyzation, the *New Mexico-Arizona Act*, Section 28, does not contain any express restrictions as to the manner of leasing. Both this *Act* and the *Nebraska Act* placed the respective state in the position of a trustee. The Nebraska District Court case cited in the above quotation interpreted *Lassen* as does Petitioner by saying:

> "School lands, however, are held by the state as trustee, and are available to the state only for the support of common schools. As trustee, the state can dispose of school lands only for the benefit of the cestui que trust." 265 F. Supp. 564, at 566.

Any trustee must act reasonably. Thus Arizona and Nebraska were in identical positions concerning whether to add a condemnation clause prohibiting the lessee from sharing in condemnation proceeds, except as to improvements. Petitioner says that when the *Act* gave the Arizona Legislature the right to determine the manner of leasing, it left it to that Legislature or to the agency that the Legislature delegated the lease terms, power to determine whether the trust would be better benefited by including or not including a condemnation clause. This power stands unless there was evidence it was unreasonably exercised. *Boland* v. *Mercantile Commerce Bank & Trust Co.*, 349 Mo. 731, 163 S.W.2d 597; *In re Reckford's Will*, 307 N.Y. 165, 120 N.E.2d 696; *First-Trust Joint Stock Land Bank of Chicago* v. *Hickok*, 367 Ill. 144, 10 N.E.2d 646; *Central Hanover Bank & Trust Co.* v. *Hoey*, 74 F. Supp. 770 (D.C.N.Y.); *In re Willenbrock's Estate*, 228 Iowa 234, 290 N.W. 502. Petitioner's Opening Brief, at 15, shows the vast number of lands, 78,000,000 acres, that may be affected by this question.

Until the Opinion of the Court of Appeals below, the unanimous rule was that every case that considered the issue determined that a lessee of school trust lands, upon condemnation, had a compensable property right. *State* v. *Platte Valley Pub. Power & Irrig. Dist.*, 147 Neb. 289, 23 N.W.2d 300, 166 A.L.R. 1196; *Nichols* v. *Oklahoma City*, 195 Okla. 305, 157 P.2d 174; *City of Oklahoma City* v. *Garnett*, 296 P.2d 766 (Okla.). *State* v. *Platte Valley* did not allow Oklahoma's lessee of state land

to seek additional eminent domain compensation for the right to re-lease at the expiration of the 25 year lease term, because such was merely a right to lease provided no person offered a higher bid in a return to the state.[5] Such case distinguished the Nebraska statute applicable to re-leasing from a prior statute, similar to Arizona's pertinent statute, that flatly gave the lessee a preferred right to renewal. Then the case explained why the renewal right was not allowed, saying:

> "It depends upon whether or not some third person, at the expiration of the lease, makes a higher bid than that of the lessee. That is purely speculative." 166 A.L.R. 1196 at 1207.

Arizona's is not speculative, but specifically says if there is re-leasing, a lessee who has substantially complied with the terms of his lease has a preferred right of renewal. § 37-291, *A.R.S., 1956*. *City of Oklahoma City* v. *Garnett*, above, rejected the proposition "that a preference right of a school land lessee to renew his lease from time to time as the existing lease expires is not a proper element of damages where a leasehold is taken in condemnation", saying:

> "It is true that upon the expiration of a lease if the commissioners of the Land Office of the State of Oklahoma choose not to renew it, or to sell the land, the lessee has no remedy to compel them to do so, but the fact that the land is always for sale or lease renders the right to buy at the appraisal, or to re-lease a valuable one." 296 P.2d 766 at 769.

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5. But the lessee was held to be entitled to compensation for the unexpired lease term.

The evidence below, as shown in Petitioner's Opening Brief, was in accordance with what was said in this last above quotation. Arizona did not challenge the fact that but for the condemnation, the land in question would have been re-leased to Alamo for two additional ten-year terms. The District Court specifically so found.[6] (A. 4) The testimony as to the length of the lease depended upon how long it would take to reclassification. Petitioner did not attempt to extend the leasing beyond reclassification, as it could have, because § 37-290, *A.R.S. 1956* again, upon reclassification, gave Petitioner a preferred right to lease the reclassified land at the reappraised rental thereof. Nor did Alamo seek any recovery, as *City of Oklahoma* v. *Garnett* would permit because it could bid at any sale of the state lands and had the advantage of receiving from a competitive purchaser the value of its improvements. § 37-241, § 37-242, *A.R.S. 1956*. It was not necessary for Alamo to delve into any sale issue, because there was no evidence below of any likelihood of any sale of the land Alamo was leasing, probably because of its isolation and its admitted value in conjunction with Alamo's irrigated, by-the-river, fee land, or, conversely, because of its small value if not considered in conjunction with such year-around pasture land.

Petitioner's preferred right to renewal pursuant to the above Arizona statutes is not the speculative, hoped for lease renewal in Arizona's cases such as *Scully* v. *United States*, 409 F.2d 1061 (10th Cir. 1969), and *United States* v. *Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 727 (1946). Petitioner's renewal rights were legal and more than a mere expectancy. They are stronger

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6. His findings must be accepted if supported by the evidence, for then they are not clearly erroneous. *United States* v. *General Dynamics Corp.*, 94 S. Ct. 1186, 1199.

than those in *Almota Farmers Elevator & Whse. Co. v. United States*, 409 U.S. 470, 93 S. Ct. 791, 35 L. Ed. 2d 1, which, although not there legally enforceable, were more than a mere expectancy because of what had happened since 1919, the condemnation being in 1967, and consequently sufficient to permit the lessee to have renewal considered. Even the reasoning of the dissent of this case, when applied to Petitioner's statutory renewal rights, is compatable to Petitioner's position. For an interesting analysis of the general subject matter, see discussion under syllabi 1-3 in *Stroh v. Alaska State Housing Authority*, 459 P.2d 480 (1968 Alas.).

Petitioner should not be thwarted because its preferred renewal right is not enforceable against Arizona as determined in *Manning v. Perry*, 48 Ariz. 425, 62 P.2d 693, because it still has an enforceable legal right against another person to whom the state would lease in violation of its preferred re-lease right. *Manning v. Perry*, above; *Ehle v. Tenny Trading Co.*, 56 Ariz. 241, 107 P.2d 210. *Ehle* held that Arizona's statutory preferred re-leasing right gives the lessee a better or superior right to a lease than another and, in essence, recognized the property right of a lessee by citing and quoting from a Wyoming case that determined by such renewal provisions the legislature made it a state policy to recognize equities of those who have built up a ranching business in the state. Specifically, Wyoming, in *Hogan v. Greenfield*, 58 Wyo. 13, 122 P.2d 850, determined, in an estate matter, that the preferential right of renewal of a lessee of state school land was a property right.

All of these school trust land decisions manifest an idea among the states that a lessee of such lands did have a property right. The Arizona Legislature thought so. *A.R.S.* § 41-511.06, Added Arizona Session Laws 1957, Ch. 99, § 1.

Arizona's Legislature only provided one way that a lessee in compliance with the lease could be ousted from possession prior to expiration of the lease term.[7] This was reclassification by § 37-290 *A.R.S. 1956*, which, as above, gives the lessee a preferred right upon reclassification to re-lease at the reclassified leasing price. The lease, set forth in the Appendix, is in accord. It permits termination upon thrity days written notice after reclassification. See paragraph P., A. 13. Such possibility of termination does not, in and of itself, limit the lease term to the thirty days limitation, but is merely "a circumstance to be considered in determining the proper award to be made." *State* v. *Keneally*, 142 Mont. 256, 384 P.2d 770, 777, discussion under syllabus 14. *Cf. Brooklyn Eastern Dist. Terminal* v. *City of New York*, 139 F.2d 1007 (2d Cir. 1944), discussion under syllabus 10, 11.

The lease provision against the creation of any vested right in the lessee, paragraph Q, A. 14, does not restrict Petitioner's condemnation right. Petitioner, in the Opening Brief, at 17, provided law that the word "vested" meant the estate involved is not subject to any contingency. The above argument shows that Petitioner's term was subject to a contingency, which was termination upon reclassification, and that such contingency does not prevent consideration of the value of Petitoner's lease-

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7. Although *Title 37, Chapter 2, Art. 3*, contains many provisions about the sale of state lands, none of the statutes therein say that sale terminates the unexpired lease term. Thus, the sale would not effect the lessee's rights for the unexpired term but would simply substitute the purchaser to the rights of the original lessor. *Eldredge* v. *Jensen*, 19 Idaho 243, 404 P.2d 624, discussion under syllabus 1, and *Garetson* v. *Hester*, 57 Cal. App. Rptr. 2d 39, 133 P.2d 863, discussion under syllabus 1.

hold upon condemnation, but is simply an element or circumstance to be considered by the trier of fact. There was no evidence below to contradict Petitioner's testimony that there would have been two ten-year renewals before reclassification. Appraiser Rowe, upon whom Arizona places so much reliance, found preference for renewal officially sanctioned and practiced as a custom. (A. 28) His appraisal said nothing about termination upon reclassification. The closest vesting case that Petitioner can find is *Yates v. Hawkins*, 46 N.M. 249, 126 P.2d 476, which held that a statutory right to repurchase land by a delinquent taxpayer was not vested (absolute) because the right did not extend to when the state itself was the purchaser at the tax sale. No case says a property right to be compensable in condemnation must be vested. The above authorities, as to a termination possibility, are contrary.

QUESTION PRESENTED II

Arizona states very little about Petitioner's Question Presented 2, which is that even if *Lassen v. Arizona Highway Dep't.*, above, is against it, the school trust received full value for its interest because the share awarded to Arizona was more than Arizona would have received but for enhancement in value of the land because of the use of the land in conjunction with Alamo's valuable by-the-river farm land. Arizona's primary opposition is a conclusion of Mr. Rowe in his appraisal, see pages 15-46 of the Appendix, that Petitioner would only receive the value of its leasehold interest. Since such an opinion of law is obviously not binding upon the court, Petitioner in its Opening Brief and now emphasizes the testimony before the District Court and some of Mr. Rowe's conclusions that

were within his expertise.[8] As did Petitioner's appraiser, Mr. W. D. Davis, Mr. Rowe recognized that the state lands in question were valuable because their use with Alamo's fee land irrigated pasture allowed a livestock breeding nuclei to be maintained during dry periods, A. 21, and permitted maintaining livestock in a dry season or until more favorable circumstances for forage production occurs. (A. 24, 25)

Petitioner's appraiser agreed with Mr. Rowe's conclusion, A. 21, that the state lease land, being barren and higher than Alamo's irrigated farm land upon the valley floor by the river, had very little present usefulness except for a use associated with such irrigated, developed land. T. 86, 87, discussed in Petitioner's Opening Brief at 7. The District Court understood this association, for it said:

> "Alamo asserts that, were it not for the condemnation proceedings, the premises in question would have been continuously leased to it by the State, and the true value of the premises would be reflected in the use of the premises in connection with other properties owned or controlled by Alamo as a cattle ranch; that the property would otherwise be, relatively, of no value." Appendix at 2

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8. Experts can only give opinions and conclusions within the range of their specialities. *Farris v. Interstate Circuit*, 116 F.2d 409 (5th Cir.); *Faircloth v. Lamb-Grays Harbor Co., Inc.*, 467 F.2d 685 (5th Cir). A layman's opinion on a matter of law has no probative value. *Glens Falls Ins. Co. v. Gray*, 386 F.2d 520 (5th Cir.); *Spellman v. American Barge Line Co.*, 176 F.2d 716 (3rd Cir.).

Although the Opinion and Judgment of the District Court did not specifically say that Alamo's assertion was adopted by the District Court as a finding, a reading of the Opinion and Judgment shows this was the opinion of the District Court. Regardless, the testimony supports such a finding. It is axiomatic that a judgment will be upheld if there is any factual basis to support it. *Brown* v. *Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469, discussion under syllabus 13; *Jaffke* v. *Dunham*, 352 U.S. 280, 77 S. Ct. 307, 1 L. Ed. 2d 314, discussion under syllabus 1.[9]

Respectfully submitted,

/s/ Gordon Cook

J. Gordon Cook

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9. The two (2) syllabus references refer to the Supreme Court Reporter.

CERTIFICATION

J. Gordon Cook, being duly admitted to practice before the Supreme Court of the United State of America, herewith certifies that three copies of the Reply Brief have been delivered to the State of Arizona by depositing the same in the office of the attorney for the State of Arizona who appeared below in the District Court and the United States Court of Appeals for the Ninth Circuit, to-wit: Peter C. Gulatto, Assistant Attorney General, State of Arizona, State House, Phoenix, Arizona 85007.

Additionally, as a courtesy, I herewith certify that service of three copies of this Reply Brief has been made upon the United States of America by depositing the same in a United States mailbox, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

J. Gordon Cook

Supreme Court, U. S.
FILED
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No. 74-125

In the Supreme Court of the United States

OCTOBER TERM, 1974

ALAMO LAND AND CATTLE CO., INC., PETITIONER

v.

THE STATE OF ARIZONA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

WALLACE H. JOHNSON,
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In the Supreme Court of the United States

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ALAMO LAND AND CATTLE CO., INC., PETITIONER

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THE STATE OF ARIZONA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 29, 1974, inviting the Solicitor General to express the views of the United States in this case.

QUESTION PRESENTED

Whether the New Mexico-Arizona Enabling Act empowers the States of Arizona and New Mexico to lease school trust lands in such a manner that the lessee may become constitutionally entitled to just compensation for the value of its unexpired leasehold interest upon condemnation of the lands by the United States.

STATEMENT

Under Sections 24 and 28 of the New Mexico-Arizona Enabling Act, 36 Stat. 557, the State of Arizona holds certain lands in trust for the support of common schools.[1] Section 28 of the Act authorizes the State to lease those lands "to the highest and best bidder at a public auction" for not less than their appraised "true [rental] value" (Pet. App. B, pp. A-10, A-11).[2] Acting pursuant to this statutory authorization, the State leased certain of its school trust lands to petitioner for grazing purposes for a term of ten years. This case arises out of the condemnation of those lands by the United States during the term of petitioner's lease.

Petitioner, the State, and the United States jointly stipulated, at the time of condemnation, that the value of the condemned lands, including all improvements thereon, was $118,620. The United States then paid that amount into the United States District Court for the District of Arizona for distribution. After a hearing, the district court awarded $57,970 to the State for its fee interest and $60,650 to petitioner ($57,050 for its leasehold interest and $3,600 for the value of its improvements) (Pet. App. A, pp. A-2 to A-3).

The State appealed from the award of compensation for petitioner's leasehold interest.[3] The court of appeals reversed (Pet. App. A, pp. A-1 to A-6). Relying upon this

[1]"[T]he United States has a continuing interest in the administration of both the lands and the funds which derive from them." *Lassen* v. *Arizona Highway Dept.*, 385 U.S. 458, 460.

[2]Sections 24 and 28 of the Act, as amended, are set forth at Pet. App. B, pp. A-8 to A-13.

[3]The State concedes that petitioner is entitled to compensation for the value of its improvements (Pet. App. A, p. A-2).

Court's statement in *Lassen* v. *Arizona Highway Dept., supra,* 385 U.S. at 466, that "[t]he Enabling Act unequivocally demands * * * that the trust receive the full value of any lands transferred from it * * *," the court of appeals held that under the Act the State was entitled to compensation for the full value of the condemned lands, unreduced by the value of any unexpired leasehold interest. So reading the Act, the court concluded that the State had no power to create leasehold interests that would be compensable upon condemnation.

DISCUSSION

1. Under the Fifth Amendment, the holder of an unexpired leasehold interest in land is entitled to just compensation for the value of that interest upon condemnation of the land. *United States* v. *Petty Motor Co.*, 327 U.S. 372. A statute might, however, impose such restrictions upon the scope of leasehold interests created thereunder as to deprive such interests of any compensable value. But we do not believe that the New Mexico-Arizona Enabling Act has that effect.

A leasehold interest has compensable value when the capitalized fair rental value for the term of the lease exceeds the capitalized value of the lease rentals.[4] Stated in other terms, compensable value "is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew* * *, less the agreed rent which the tenant would pay for such use and occupancy." *United States* v. *Petty Motor Co., supra,* 327 U.S. at 381. To bar a leasehold interest from

[4]For clarity of analysis, we here pretermit the additional consideration of possible renewals at less than fair rental value. But see *Almota Farmers Elevator & Whse. Co.* v. *United States,* 409 U.S. 470.

having compensable value, the statute under which it was granted would have to prevent such a disparity between lease rentals and fair rental value from arising.[5]

A disparity between the lease rentals and fair rental value could arise either because the lease rentals were initially set at less than fair rental value, or because during the term of the lease the value of the land (and consequently its fair rental value) increased without a commensurate increase in the lease rentals. The Enabling Act does protect against the initial setting of lease rentals at less than fair rental value: Section 28 (para. 4) prohibits the leasing of school trust lands for less than their "true [rental] value," and this prohibition is enforced by the stipulation (*id.* at para. 9) that "[e]very sale, lease, conveyance, or contract of or concerning any of the [school trust] lands * * * not made in substantial conformity with the provisions of this Act shall be null and void * * *" (Pet. App. B, pp. A-11, A-13). Thus any lease of school trust land under the Act that prescribes a rental of less than the land's fair rental value as of the beginning of the lease term (as determined by the appraisal required by the Act) is null and void, and the holder of such a leasehold interest therefore would not be entitled to compensation upon condemnation.

On the other hand, nothing in the Act requires adjustment of lease rentals in the event of an increase in the fair rental value of the land during the term of the lease. Accordingly, such an increase in fair rental value would confer

[5]Alternatively, the statute arguably could provide that all leases granted thereunder were revocable at will by the State (cf. *United States* v. *Fuller*, 409 U.S. 488) or, more directly, that upon condemnation no compensation would be payable to the lessee. But the Enabling Act contains no such provisions.

compensable value upon a valid leasehold interest. We therefore believe that the court of appeals erred in holding that the Act, by its terms, bars the State from leasing school trust lands in any manner that might result in the lessee becoming constitutionally entitled to just compensation for the value of its unexpired leasehold interest.

This Court did say in *Lassen* v. *Arizona Highway Dept.*, *supra*, 385 U.S. at 468, that the Act demands that the school trust receive the full value of any *lands* transferred from it. But the Court was not there addressing a situation in which a third party held the possessory interest in the land at the time of condemnation. We believe that the substance of the Court's statement in *Lassen* is simply that the trust must receive the full value of any *interests* transferred from it. Our position here is in harmony with that reading of *Lassen*: the State, acting in its capacity as trustee, must receive the full value (fair rental value as of the beginning of the lease term) of the possessory interest transferred by lease, and upon condemnation also must receive the full value of its reversionary interest. But it is not additionally entitled to receive the compensable value of the leasehold interest.[6] Cf. *State of Nebraska* v. *United States*, 164 F.2d 866 (C.A. 8), certiorari denied, 334 U.S. 815.[7]

[6]A contrary implication from *Lassen* is possible. The Court there held that the Act requires the State to pay the full monetary value of trust lands taken for highway construction, without any offset for resulting enhancement in the value of adjacent trust lands. The Court thus apparently viewed the Act as at least partially protecting the trust against unfavorable applications of normal just compensation principles. Cf. *Bauman* v. *Ross*, 167 U.S. 548, 584. But we see nothing in the statutory language that renders the just compensation clause wholly inapplicable to the leasehold interests created thereunder.

[7]Petitioner errs in asserting (*e.g.*, Pet. 7) that the holding below *directly* conflicts with *State of Nebraska* v. *United States*, *supra*. The two cases turned upon different statutes. But the actual differences between the school trust provisions of the Nebraska Enabling Act and those of the New Mexico-Arizona Enabling Act are insubstantial. Thus it can fairly be said that the two decisions represent a conflict in approach to the question of statutory interpretation presented here.

2. This is not to say that petitioner is entitled to compensation in this case. That depends on whether the rentals under petitioner's lease are less than the appraised rental value as of the beginning of the lease term or whether the land subject to the lease was appraised as required by the Act. If the lease was not "made in substantial conformity with the provisions of [the] Act", it is null and void and petitioner is not entitled to compensation. Moreover, even if petitioner's lease is valid under the Act, state law or the provisions of the lease may bar creation of compensable value (see Pet. App. A, pp. A-3 to A-4; cf. note 5, *supra*). The court of appeals did not pass on those questions, and we express no opinion on them here.[8]

3. The question presented here is of continuing importance in the States of Arizona and New Mexico. There are now pending in the United States District Court for the District of New Mexico cases involving the condemnation of more than 300,000 acres of school trust lands; the distribution of condemnation proceeds as between the lessees and the State of New Mexico, as trustee, awaits the disposition of this case. Moreover, several other western states are subject to similar enabling legislation (cf. *State of Nebraska* v. *United States, supra*), and the decision in this case will guide the distribution of condemnation proceeds in those jurisdictions as well.

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[8]Petitioner further contends that the State would not in any event be entitled to compensation for the value accruing to the land as a result of its proximity to facilities on petitioner's nearby land (Pet. 11-12). Our analysis of petitioner's principal contention covers this contention as well: value inherent in the land at the beginning of the lease term, because of its proximity to existing irrigation or other useful facilities, belongs to the State as trustee; but, assuming the validity of the lease and the absence of any contrary provisions in the lease or in state law, value added to the land during the term of the lease as a result, *inter alia*, of the lessee's construction of nearby facilities properly belongs at least in part to the lessee.

CONCLUSION

For the foregoing reasons, we believe that the States of New Mexico and Arizona are empowered by the New Mexico-Arizona Enabling Act to lease school trust lands in such a manner that, upon condemnation, the lessee may become constitutionally entitled to just compensation for the value of its unexpired leasehold interest. This question is of continuing importance to those States and to persons holding leasehold interests in school trust lands therein.

Respectfully submitted.

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